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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
7

8 JOHNNY RAY BROWN,

9 *Petitioner,*

2:10-cv-00407-PMP-GWF

10 vs.

ORDER

11 BRIAN WILLIAMS, *et al.*,

12 *Respondents.*
13

14 This habeas matter under 28 U.S.C. § 2254 comes before the Court for a final decision
15 on the grounds that remain.
16

17 ***Background***

18 Petitioner Johnny Ray Brown challenges his 2002 Nevada state conviction, pursuant
19 to a jury verdict, of three counts of sexual assault and one count each of battery with intent
20 to commit a crime, burglary and grand larceny. He challenged the judgement of conviction
21 in the state courts on direct appeal and state post-conviction review.

22 On federal habeas review, Petitioner presents a number of grounds, including a ground
23 challenging the sufficiency of the evidence on the three counts of sexual assault. Brown
24 maintains that he instead had a consensual sexual relationship with his stepdaughter.

25 The trial evidence tended to establish the following on the sexual assault counts.¹
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27 ¹The Court makes no credibility findings or other factual findings regarding the truth or falsity of
28 evidence or statements of fact in the state court. The Court summarizes same solely as background to the
issues presented in this case, and it does not summarize all such material. No statement of fact made in

(continued...)

1 In March 2000, Nichole Coates was Johnny Ray Brown's stepdaughter. She then was
2 eighteen, and Brown was in his early forties. Coates worked at a Subway sandwich shop on
3 Sahara and Eastern in Las Vegas, Nevada. Her mother, Mary Stadler, was the manager; and
4 Brown was the assistant manager. They worked a daytime shift and Coates worked an
5 evening shift. Brown and Coates' mother lived in an apartment that was only a short distance
6 away, at Karen and Eastern, perhaps a five minute walk from the Subway. At that time,
7 Coates lived in Henderson, Nevada, an outlying suburb of Las Vegas. She did not have a
8 car, and she would catch rides to get around town. Coates occasionally would stay over at
9 her mother's apartment. She testified that she did not spend much time there, however,
10 because she did not get along with Brown and did not feel comfortable around him. Stadler
11 also did not schedule them on the same shift because they did not get along.²

12 During the evening hours of March 20, 2000, Nichole Coates was visiting a friend at
13 an apartment in the same building as her mother's apartment. At approximately 12:30 to 1:00
14 a.m. on what by then was March 21, 2000, Coates went to her mother's apartment. Her
15 mother was either asleep or laying down in the bedroom, and Brown was in the living room
16 drinking and singing loudly with both music and the television also playing loudly. Coates
17 went to the bedroom. Her mother shouted to Brown to turn off the sound and go to sleep, but
18 he ignored her. After getting a snack, Coates laid down to sleep beside her mother on her
19 mother's side of the bed.³

20 Later in the night, Coates awoke to find Brown sitting beside her on the bed, *i.e.* sitting
21 by her on the edge of the bed on her mother's side of the bed. Coates and then her mother
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23 ¹(...continued)

24 describing statements, testimony or other evidence in the state court constitutes a finding by this Court. The
25 significance of other evidence or categories of evidence referred to by Petitioner in support of his claims is
26 addressed in the discussion of the particular claims. The present recital of the evidence constitutes only an
overview for context. Any absence of mention of a specific piece of evidence or category of evidence in this
overview does not signify that the Court has overlooked the evidence in considering Petitioner's claims.

27 ²#29, Ex. 55, at 26-31, 91-92 & 125 (Coates); *id.*, Ex. 57, at 35-39, 41-43, 64, 67-68 & 103 (Stadler);
see also *id.*, at 111-13 (coworker); #67, Ex. 132, at 53.

28 ³*Id.*, Ex. 55, at 31-34 & 86-88 (Coates); *id.*, Ex. 57, at 42-44, 81-86 & 101-02 (Stadler).

1 yelled at Brown, and Coates went to the living room. She turned off the television and went
2 to sleep on the couch with a comforter and blanket wrapped around her.⁴

3 Later that morning, Nichole Coates, as she described it, “got woke up to a frying pan.”
4 That is, she was woken up by Brown hitting her on the head with a frying pan. She did not
5 know how many times Brown had hit her before she woke up, but it was Brown hitting her with
6 a cast iron skillet that woke her up. He was sitting on the coffee table by the couch with what
7 by then was only a remaining part of the skillet in his hand. Mary Stadler testified that the
8 skillet neither had been out nor had it been broken prior to when she left for work earlier that
9 morning.⁵

10 Brown then gripped Coates’ arm tightly. He told her that if she did what he said that
11 he would not kill her. He told her that he had a pistol close by.⁶

12 Brown pushed the comforter away and started rubbing Coates’ breasts through her
13 shirt. She started crying and told him “no.” Brown told her that if she did not shut up she
14 would not live anymore. When Coates tried to resist, Brown gripped her arm with even
15 greater force, pressing and pinning her arm down against the couch, telling her, again, that
16 if she did not do what he said, he would kill her.⁷

17 Brown unbuttoned the overalls that Coates was wearing, put his hand inside the
18 overalls, and started rubbing her vagina. She continued saying “no” even louder and trying
19 to resist and move away from his grip. He continued to grip her arm tightly, and he told her
20 again that if she did not stay still and do what he said, he would kill her.⁸

21 Brown then stood Coates up while pulling her overalls all the way off her. To do this,
22 he gripped her arm even tighter and forcefully lifted her up. She continued crying, telling him
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24 ⁴#29, Ex. 55, at 34-37, 95-97 & 100-01 (Coates); *id.*, Ex. 57, at 43-44 & 85 (Stadler).

25 ⁵*Id.*, Ex. 55, at 37-39 & 97-101 (Coates); *id.*, Ex. 57, at 45-46 (Stadler).

26 ⁶*Id.*, at 39-40 & 102.

27 ⁷*Id.*, at 40 & 102-03.

28 ⁸*Id.*, at 40-41, 54-55 & 103.

1 “no,” and tried to sit back down and move away from Brown. He forced her to stand up,
2 telling her that if she wanted to live, she would do what he said.⁹

3 Brown then took Coates by the arms and forced her into the bedroom, telling her that
4 if she did not go he would kill her. He forced her onto the bed, and he then took off her shirt,
5 bra and panties while still gripping her arm. Brown then started touching Coates’ breasts
6 again. He inserted his fingers and then his tongue into her vagina. Brown, who had disrobed
7 by this time, then penetrated her vagina with his penis with Coates laying on her back. He
8 then flipped her over onto her stomach, with the comforter on the bed partially underneath
9 her, and again penetrated her vagina with his penis, until he ejaculated.¹⁰

10 Brown flipped Coates onto her back again and started choking her. Coates said to him
11 that she did not want to die and to not kill her. Brown said that he knew that Coates and her
12 friends had stolen a vehicle of his that had been repossessed. He then told her to perform
13 oral sex on him but to not bite him. Coates did not comply. Brown said that he had not
14 allowed any of her male friends to come over because they could not do anything for her that
15 he could not do and that all that she needed was him.¹¹

16 Coates, still crying, tried to convince Brown that she would not call the police or tell
17 anyone. Brown let Coates sit up on the edge of the bed, but he continued to hold her firmly
18 by the arm. At one point, Brown stated that he knew that he had done wrong and should not
19 have done so but that even if he went to jail he got what he always wanted.¹²

20 Several minutes later Brown released Coates’ arm. He told her that she had to take
21 a shower so that there would not be any evidence. Coates tried to stall him, first getting him
22 to allow her to go to the kitchen to get a drink of water, with Brown again holding her by her
23 arm. Ultimately, however, he forced her to go to the shower in the bathroom, physically
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25 ⁹#29, Ex. 55, at 41-42.

26 ¹⁰*Id.*, at 41-46, 55-56 & 103-08.

27 ¹¹*Id.*, at 46-47 & 107-08.

28 ¹²*Id.*, at 47.

1 forcing her with his hold on her arm to the bathroom. He had picked up a butcher knife at
2 some point while they were in the kitchen, and he threatened her with the butcher knife. He
3 again told her that if she wanted to live that she would do what he told her to do. He said that
4 it would be very easy to kill her and that no one would even know, that he could pretend that
5 he came home and found her dead.¹³

6 Coates got in the shower, but she tried to stay as far away from the running water as
7 she could without Brown noticing as he stood nearby. When she got out, Brown, with the
8 butcher knife still in hand, made her get dressed in clothes that he had picked out for her. He
9 then made her brush her hair. She still had been telling him that she would not tell the police.
10 Coates then saw her face in the mirror, and she could see the swelling from where she had
11 been hit on the head. When Brown asked what she was going to say to her mother about
12 that, Coates said that she would tell her that she got beat up outside the apartment. Brown
13 was skeptical at first, but Coates persisted.¹⁴

14 Brown then set the knife down, and he started to get in the shower. Coates ran for the
15 door and was able to get through the locked door before Brown was able to turn off the
16 shower and come after her. She ran to the friend's apartment, in the same building, where
17 she had been visiting before she went to her mother's apartment the prior evening.¹⁵

18 The friend was home. Coates – immediately – asked to use his phone. She told her
19 friend – again, immediately – that her mother's husband had just raped her and that she
20 needed to call 911.¹⁶

21 Coates – immediately – called 911.¹⁷

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24 ¹³#29, Ex. 55, at 47-49 & 108-13.

25 ¹⁴*Id.*, at 49-51 & 114-19.

26 ¹⁵*Id.*, at 51, 56-57, 92-94 & 117-19.

27 ¹⁶*Id.*, at 51-52.

28 ¹⁷*Id.*, at 52 & 57-58. The 911 tape was played for the jury. *Id.*, at 57-58.

1 Coates then called her mother at the Subway – immediately after the 911 call. She
2 told her that Brown had just raped her and to lock the door because Coates did not know what
3 he might do. Stadler described her voice as: “It was terror, she was scared to death.”¹⁸

4 As she was hanging up from the call, Stadler saw Brown running across the parking
5 lot in front of the sandwich shop. He got into their car, “gave her the finger,” waved goodbye,
6 and drove away “[a]s fast as he could get out of there.”¹⁹

7 Paramedic Dianna Toney was dispatched at 11:12 a.m. and arrived at the friend’s
8 apartment at 11:23 a.m. Nichole Coates was sitting quietly at a table crying softly, but she
9 was calm enough to give a rational statement. Coates told Toney that she had been sleeping
10 on the couch, that she was awoken by her mother’s husband hitting her with a frying pan on
11 the right side of the head, that he raped her, and that he forced her to take a shower after the
12 rape while holding a butcher knife. Coates stated that she did not wash her genital area while
13 in the shower. She also stated that she was hit in the back of the head after she was raped.²⁰

14 Toney observed a contusion and bruise on Coates’ right eyelid, a contusion on the right
15 side of her head and face, some scrapes on her right arm, and a bit of a contusion around her
16 right elbow, which probably would have produced blood at some point.²¹

17 About an hour after the initial 911 call, the crime scene analyst took photographs of the
18 apartment reflecting, *inter alia*, the clothes that Coates had said that Brown had taken off her
19 at the various locations. The analyst recovered, *inter alia*, a comforter that later tested
20 positive for the presumptive presence of semen and the pieces of the frying pan. The analyst
21 was unable to secure fingerprints from the handle due to the type of surface involved.²²

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24 ¹⁸#29, Ex. 55, at 58-59 (Coates); *id.*, Ex. 57, at 39-40 & 87 (Stadler).

25 ¹⁹*Id.*, Ex. 57, at 39-42 & 86-88 (Stadler).

26 ²⁰*Id.*, Ex. 55, at 126-31 & 134-36.

27 ²¹*Id.*, at 128-29 & 132-33.

28 ²²*Id.*, at 136-51, 154-68 & 172-76 (crime scene analyst); see also *id.*, at 65-67 (Coates).

1 Photographs of Coates taken shortly after 2:15 p.m. at the hospital showed fresh
2 bruising and injuries to her forehead, the right side of her face and neck, and her elbows. The
3 crime scene analyst who took the photographs testified that there was redness and bleeding
4 in the facial injuries consistent with Coates having been hit by something or someone. The
5 analyst declined to opine, as she was not a physician, as to the age of the bruising or the
6 extent to which there would have been surface bleeding from Coates' injuries.²³

7 The sexual assault nurse examiner was the first and only person to examine Nichole
8 Coates in the triage unit at the hospital, with her exam starting between 12:30 and 1:00 p.m.
9 When she examined her, Coates was frightened, agitated, angry, and in physical pain. She
10 testified that most sexual assault victims were frightened and agitated after being sexually
11 assaulted and that they also tended to be angry if they knew the assailant.²⁴

12 Coates had a black eye; a bump on the back of her head; abrasions to her forehead,
13 neck, eye and cheek; and abrasions and bruises on her arms.²⁵

14 At the time that the photographs were taken, the blood then was building up on the top
15 lid of the black eye. The eye was closing but not quite yet swollen completely shut from the
16 swelling. The eye could be opened only with manual assistance or extreme effort.²⁶

17 The bump on the back of Coates' head was not immediately visible to the eye.
18 However, the nurse could feel the soft tissue swelling when she manually palpated the area.²⁷

19 Regarding the bruising and abrasions on Coates' forehead, face, neck, and arms, the
20 nurse testified that from the coloring it was evident that they were recent injuries.²⁸

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23 ²³#29, Ex. 55, at 152-54 & 169-71 (crime scene analyst); see also *id.*, at 61-64 (Coates).

24 ²⁴*Id.*, Ex. 57, at 3-4, 9, 11-13 & 29.

25 ²⁵*Id.*, at 4-10, 22-23 & 30-31.

26 ²⁶*Id.*, at 4 & 8-10.

27 ²⁷*Id.*, at 4-5.

28 ²⁸*Id.*, at 8-10 & 31.

1 The nurse did not observe any trauma to the vaginal area. She testified that there was
 2 no trauma in about forty-five percent of overall sexual assault cases. If there was a threat of
 3 injury or death by the attacker, there was little resistance by the victim. She testified that the
 4 victim would tend to comply with the assailant at that time because “[s]elf-preservation is the
 5 main motive at that time.” Where there was a threat of force, she testified that ninety percent
 6 of the cases would show no trauma.²⁹

7 The nurse did not observe the presence of semen at least in the assisted visual
 8 examination that she performed. She testified that this was not common. The nurse
 9 elaborated, however, that different males secrete different amounts of semen. Moreover,
 10 Coates had been in the shower, had changed clothes, and also had urinated prior to the
 11 exam. Both urination and the act of wiping after could result in the loss of evidence.³⁰

12 Coates told the nurse, *inter alia*, that she had been hit in the head, face, back of the
 13 head, and arm and elbow areas with a frying pan, that the assailant had her take her clothes
 14 off, that he told her that he had a gun but that she never saw it, that he put his mouth on her
 15 vagina and then his penis in her vagina, that she believed that he ejaculated, that he had her
 16 take a shower while armed with a butcher knife, and that she was able to leave when he got
 17 into the shower.³¹

18 The nurse checked “yes” for responses by Coates as to penetration of the vagina,
 19 mouth, and rectal area. However, a “yes” would be marked on that portion of the form for
 20 touching of the area without actual penetration, as the purpose of that portion of the form was
 21 to identify areas for the nurse to swab for the possible presence of semen.³²

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 24 ²⁹#29, Ex. 57, at 6-7 & 13-17; see also *id.*, at 23-28 (acknowledging that she might have testified in
 an earlier case then to a thirty-five percent figure as to the percentage of overall cases without trauma).

25 ³⁰*Id.*, at 10, 11, 21-22 & 30. As discussed herein, Brown did not deny sexual activity with Coates. He
 26 instead claimed that the sex was consensual.

27 ³¹*Id.*, at 7.

28 ³²*Id.*, at 8, 19, 29-30 & 32-33.

1 The nurse acknowledged on cross-examination that Coates said that her vagina had
2 not been penetrated by Brown's finger (as opposed to be his tongue and penis), that he had
3 placed his mouth on her vagina in addition to penetration with his tongue, that his finger had
4 "penetrated" her rectum (at least in the sense used in completing the form), that he had either
5 kissed or licked her mouth, and that she had scratched Brown.³³

6 The nurse testified on cross-examination that Coates "was not coherent in her thoughts
7 as far as what happened in what order," that "she was like having flights," and that "[s]he
8 would say one thing and then it would not be in context [of] what happened at that particular
9 time." She testified that "[i]t's not uncommon for victims to space out at different points." The
10 nurse observed that "she was still in semi-shock," and that "her sequencing was not good at
11 that time." According to the nurse, "she'd say something and then say, oh, no, that happened
12 later or no, that happened like this way or that way."³⁴

13 When Stadler saw her daughter at the hospital, Nichole Coates' face was black and
14 blue and swollen, and she was trembling and crying. Stadler further testified that her
15 daughter was "[t]rembling, shaking, crying, totally upset," "a little bit angry," and experiencing
16 "[a] lot of emotions."³⁵

17 When Coates spoke to the investigating detective, Detective Debbie Love, she once
18 again stated, consistent with her prior statements immediately after the attack and thereafter,
19 that her stepfather had hit her in the head with a frying pan and then sexually assaulted her.
20 Detective Love testified that while Coates was rational, she "was a little bit distraught" and that
21 she cried several times during the interview.³⁶

22 The state trial court allowed the defense to cross-examine Detective Love about
23 alleged inconsistencies between Coates' statement to the detective and Coates' trial

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25 ³³#29, Ex. 57, at 17-20.

26 ³⁴*Id.*, at 22 & 29.

27 ³⁵*Id.*, at 50-55 & 91.

28 ³⁶*Id.*, at 158, 174 & 185.

1 testimony, as to which alleged inconsistencies the defense had not inquired about first in
2 cross-examining Coates.³⁷

3 The defense sought to establish, *inter alia*, the following, alleged, inconsistencies in
4 Coates' statement: (a) that there was no altercation between her and Brown the night before;
5 (b) that she was laying on her back rather than her side when Brown hit her with pan; (c) that
6 Brown asked her about her sexual relationships and went through her purse and found
7 condoms; (d) that all of her clothes were removed by Brown in the living room; (e) that Brown
8 laid her on her back and started kissing her before he penetrated her with his penis; (f) that,
9 when Coates went to get a drink in the kitchen after the attack, she walked there first with him
10 following, after she tried to convince him that she would not call the police; and (g) that she
11 first saw the knife after she got out of the shower and he then walked out and put it away.³⁸

12 The prosecution established on redirect that Coates related in her statement to the
13 detective, *inter alia*: (a) that the kiss came only after Brown threatened to shoot Coates, with
14 Brown saying "either kiss me or die;" and (b) that Brown's questioning her about other sexual
15 relationships and finding condoms in her purse occurred after he sexually assaulted her.³⁹

16 Four days after the attack, on March 25, 2000, the vehicle in which Brown apparently
17 had left Las Vegas was recovered, without Brown, in Missouri.⁴⁰

18 About a week after the attack, Brown called Stadler and told her that he had been
19 having consensual sex with Coates. Stadler would not talk with him. She did not believe him
20 because "they never were ever close, they were always at each other's throats."⁴¹

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23 ³⁷#29, Ex. 57, at 175-79. *But cf.* N.R.S. 50.135(2)(b) ("Extrinsic evidence of a prior contradictory
24 statement by a witness is inadmissible unless . . . [t]he witness is afforded an opportunity to explain or deny
the statement and the opposite party is afforded an opportunity to interrogate the witness thereon.").

25 ³⁸#29, Ex. 57, at 186-98 & 201-03.

26 ³⁹*Id.*, Ex. 58, at 2-7.

27 ⁴⁰*Id.*, Ex. 57, at 162.

28 ⁴¹*Id.*, at 103-05.

1 Sixteen days after the attack, on April 6, 2000, Brown was apprehended in Michigan
 2 at his sister's house. He tried to pass himself off to officers instead as his brother. The
 3 officers inside the house at the time, as opposed to the uniformed officer on detail at the rear
 4 of the house, were dressed in civilian clothes. However, they identified themselves as officers
 5 and plainly displayed badges hanging from their necks on lanyards. The officer who testified
 6 at trial did not observe, at the arrest, any injuries to Brown's face.⁴²

7 Detective Love interviewed Brown in custody back in Las Vegas on April 18, 2000.⁴³

8 Brown acknowledged having sex with Nichole Coates on March 21, 2000. According
 9 to Brown, he and Coates had been having a sexual relationship since between the Christmas
 10 and New Year's holidays in 1998. He maintained that, prior to that time, they had been very
 11 friendly, hugging frequently. He stated that, once they became sexually involved, they had
 12 sex at least twenty times prior to March 21, 2000.⁴⁴

13 Brown told Detective Love that Coates also "used to bring a bunch of guys over too."
 14 Coates' mother typically went to bed early, and according to Brown, "[h]er and the guys would
 15 have sex in the living room on the floor and stuff like that."⁴⁵

16 According to Brown, he took Stadler and Coates out for dinner earlier in the evening
 17 of March 20, 2000, and they were drinking and smoking marijuana. He maintained that, later,
 18 after her mother had gone to sleep, her former boyfriend and a friend came over and they
 19 stayed up doing more drinking and smoking.⁴⁶

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22 ⁴²#29, Ex. 57, at 144-50.

23 ⁴³*Id.*, at 163-66.

24 ⁴⁴#67, Ex. 132, at 2-3, 5, 17-19, 24-25, 30-37, 39-47 & 52-53; #29, Ex. 57, at 144-50. The transcript
 25 of the statement filed on federal habeas review was introduced as State Exhibit 23, which was read by jurors
 26 during a reading break dedicated to that purpose. The blank spaces in the transcript represent redactions.
 See #29, Ex. 55, at 176-79; *id.*, Ex. 57, at 2 & 166.

27 ⁴⁵#67, Ex. 132, at 58.

28 ⁴⁶*Id.*, at 5-7, 55-57 & 61-62.

1 Under Brown's account, the next morning on March 21, 2000, he and Coates had sex
2 after her mother left for work. He said that they started to become intimate on the couch and
3 then had sex in the bedroom. Coates purportedly had three orgasms during oral sex. Brown
4 stated that Coates became angry when they were talking after the consensual sex because
5 he would not leave her mother for her and told her that he would not have sex with her
6 anymore. He told the detective that this made Coates mad because she told him that other
7 men could not make her orgasm like he could.⁴⁷

8 According to Brown, Coates retrieved a switchblade from a cabinet and started
9 brandishing it at him. As his account continues, Coates then took a shower and attacked him
10 barehanded afterwards. Brown maintained that he threw her down on the floor as they
11 struggled. According to Brown, she then reached over, grabbed the frying pan, and struck
12 him in the head with it. He maintained that he took the frying pan from her, hit her in the face
13 with the frying pan but only once, and then threw it. Brown told the detective that the injuries
14 to the back of Coates' head must have occurred when he threw her to the floor.⁴⁸

15 During the April 18, 2000, custodial interview, Brown showed Detective Love a bump
16 on his head. She felt the bump, but she did not see any bruising, and she did not know if the
17 bump was from the March 21, 2000, incident almost a month earlier.⁴⁹

18 Detective Love also asked Brown whether the frying pan broke at that point. He
19 responded: "I don't know. _____ after I hit her, I just threw it." He further said: "I don't know
20 where it go to."⁵⁰

21 As Brown's account continued, Coates went back into the shower and settled down.
22 He stated that he joined her in the shower and then she asked to wear one of his shirts.
23 According to Brown, Coates then left, but he followed her because "I knew what she was
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25 ⁴⁷#67, Ex. 132, at 62-64 & 67-81; #29, Ex. 57, at 169.

26 ⁴⁸#67, Ex. 132, at 81-87; #29, Ex. 57, at 168-70 & 174.

27 ⁴⁹#29, Ex. 57, at 170-71.

28 ⁵⁰#67, Ex. 132, at 87.

1 gonna do.” He knew that she was going to tell her mother that he raped her, because Coates
2 wanted him to leave her mother for her. According to his account, he followed her “right to
3 Subway,” contrary to the testimony that Coates was seen by paramedics at the apartment
4 complex and never went to the Subway that day after the attack. Brown maintained that he
5 then waved to Stadler, said “I’ll be back,” and left.⁵¹

6 Brown’s assertion that he knew that Coates was leaving the apartment to accuse him
7 of rape stood in contrast to his statement at the beginning of the interview. When Detective
8 Love asked Brown on April 18, 2000, whether he was aware that he had been accused of
9 raping Coates, he responded: “I just got aware of it when I got down here.”⁵²

10 Detective Love also asked Brown about an incident the day after the sexual assault
11 in which he went into the back room of the Subway in his work uniform when Stadler was not
12 there and stole money from the store.⁵³ Brown told the detective that both of the young
13 women employees who observed him at the time were lying. When the detective asked him
14 why the young women would lie, he stated that he thought that one of the women was a
15 lesbian and that she was having a sexual relationship with Mary Stadler.⁵⁴

16 While in custody, Brown also made statements to a corrections officer in which he
17 maintained that he had had only consensual sex with Coates.⁵⁵

18 Additional testimony reflected the following regarding how long Nichole Coates had
19 known Brown, following upon testimony initially elicited by defense counsel on cross-
20 examination of Coates.

21 *////*

23 ⁵¹#67, Ex. 132, at 87-90. #29, Ex. 57, at 171 & 173.

24 ⁵²*Id.*, at 3.

25 ⁵³The Court discusses the charges regarding the stolen money in more detail in regard to Ground 2.

26 ⁵⁴#67, Ex. 132, at 91-93.

27 ⁵⁵#29, Ex. 57, at 150-56 (the statements were made in the course of a running belligerent tirade in
28 which Brown threatened the officer and his family).

1 Before they moved to Las Vegas, Coates and her mother had lived together in
2 Pennsylvania and prior to that in North Carolina. Coates testified that they lived together in
3 an apartment along with their boyfriends in Pennsylvania. Stadler acknowledged that her
4 daughter's boyfriend was in his thirties and that she started dating him when she was fifteen.
5 She maintained that Coates' boyfriend lived nearby rather than with them in North Carolina.⁵⁶

6 While in Pennsylvania, Coates' mother broke up with her longstanding boyfriend, and
7 she later became involved with Brown. He ultimately moved into the apartment with Coates'
8 mother, Coates, and her boyfriend.⁵⁷

9 A short time, later, however, Brown and Coates' mother moved to Las Vegas, with
10 Coates and her boyfriend staying behind in Pennsylvania. Coates and her boyfriend followed
11 a short time thereafter, however, and they initially stayed with Brown and her mother. They
12 then moved to another apartment in the same complex up until the point where Coates broke
13 up with her boyfriend, for being physically abusive. It was then that Coates moved out to
14 Henderson, but she still had some of her clothes at her mother's apartment. Brown had given
15 her a ride a couple of times out to Henderson, at her mother's request.⁵⁸

16 Defense counsel also elicited the initial testimony from Coates regarding an incident
17 about six months earlier during which Brown attempted to kiss Coates and an altercation
18 ensued. Coates was visiting her mother at their apartment, when she and Brown were at a
19 different complex. Brown and Coates' mother were arguing, and Brown said to her mother
20 that she had better watch herself, referring to a knife that he had just set down. Coates asked
21 Brown "what are you going to do," and she then followed her mother to the bathroom. Brown
22 followed and attempted to kiss Coates. She slapped him hard with an open hand, and he
23 punched her in the mouth and then continued punching her in the stomach. Coates fell to the
24 ground as Brown punched her, but she eventually was able to break free and leave with her

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26 ⁵⁶#29, Ex. 55, at 69-73 (Coates); *id.*, Ex. 57, at 34-35, 61-63 & 107-08 (Stadler).

27 ⁵⁷*Id.*, Ex. 55, at 69-73 (Coates); *id.*, Ex. 57, at 34-35 & 63-64 (Stadler).

28 ⁵⁸*Id.*, Ex. 55, at 73-85 (Coates); *id.*, Ex. 57, at 34-35, 64-71 & 94-95 (Stadler).

1 mother to a 7-11 to call the police. Brown left before the police could apprehend him and no
 2 arrest had been made by the time of the second incident in March 2000. Coates had a cut
 3 lip and bruises from the first incident, but she did not seek medical attention.⁵⁹

4 The defense called two witnesses to testify. Their testimony collectively pertained to
 5 how Brown and Coates related to one another and/or Coates' demeanor after the attack.

6 Mary Cyronek was the resident administrator, or manager, of the apartment complex
 7 in which Stadler and Brown had their apartment.⁶⁰

8 Cyronek testified that Brown and Coates came to the office on two occasions, once
 9 regarding a work order and another time to obtain an air filter. She testified initially:

10 I believe at one time he came in with Nichole and there
 11 was a work order that needed to be done in the apartment and he
 12 told me what it was. I asked him if we could have permission to
 13 enter, he said yes. She was with him, they seemed very friendly.
 14 On another occasion, I think they came up and got an air filter for
 their – for his and Mary's apartment. And they seemed, you
 know, very friendly then at the time, *friendly as in just, you know,*
they just came in, said hello. They were very nice to us, they
always had been as we had been to them.

15 #29, Ex. 58, at 23 (emphasis added). Defense counsel thereafter characterized this
 16 testimony as being that "they seemed to be friendly with one another" in a compound question
 17 primarily directed to distinguishing Brown and Coates from Brown and Stadler.⁶¹ Cyronek
 18 affirmed that she did not notice any animosity between Brown and Coates -- when they were
 19 in the office briefly while requesting a work order and later getting an air filter.⁶²

20 On cross-examination, Cyronek acknowledged that Brown and Coates did not appear
 21 to be affectionate in her presence.⁶³

22 / / / /

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 24 ⁵⁹ #29, Ex., 55 at 85, 88-90 & 119-25 (Coates); *id.*, Ex. 57, at 36-37 & 70-73 (Stadler).

25 ⁶⁰ *Id.*, Ex. 58, at 21.

26 ⁶¹ *Id.*, at 24.

27 ⁶² *Id.*

28 ⁶³ *Id.*, at 28.

1 No testimony was elicited from Cyronek that she had any dealings with Brown and
2 Coates together other than during these two brief incidents, that she had any basis for
3 knowing how they related to one another in private as opposed to in public, that she observed
4 any specific behavior – such as affectionate touching or glances – suggesting that Brown and
5 Coates were intimate, or that she had any basis whatsoever for believing that they were
6 engaging in a consensual sexual relationship merely because they did not show animosity to
7 one another in the few minutes in public that it took, for example, to get an air filter.

8 Cyronek also testified regarding her observation of Coates on two occasions after the
9 attack.

10 With regard to the first occasion, Cyronek observed Coates shortly after the attack
11 while she was making her rounds:

12 Well, on that day, I was walking [the] property as I normally
13 do every day, and I came upon Apartment 169 and I saw a
14 couple of police officers outside. I went over and inquired, you
15 know, what was going on, and they had told me that she had –
16 there was a girl that lived, that was in Apartment 201 that was
17 allegedly raped. And I looked inside, I would say I was maybe
fifteen feet away. I saw Nichole sitting there talking to two
officers, her hands were folded like this, I can't recall if she was
crying or not. And they said we've got everything, you know,
under control and I said, okay, fine, and so I just went back to
office.

18 #29, Ex. 58, at 25. When asked immediately thereafter whether anything struck her as
19 unusual about Coates behavior at that time, she responded: “No, not really. Not at that time,
20 no.”

21 The foregoing was the entirety of the examination on direct on the point.

22 On cross-examination, it was established that Cyronek was standing in the doorway
23 “two, three minutes at the most;” that she saw only a side view of Coates from the fifteen feet
24 away; that the side that she saw was Coates left side, which would have been the opposite
25 side from her facial injuries; that Coates was sitting slumped over with her elbows on her
26 knees; and that Cyronek neither had any face to face contact with Coates nor spoke with her.
27 #29, Ex. 58, at 28-30.

28 ////

1 In sum, Cyronek's testimony on this point provided no more insight into whether or not
2 Coates had been raped than would testimony by any other lay bystander observing a rape
3 victim for "two, three minutes at the most" from one side from fifteen feet away while they
4 were being interviewed by law enforcement professionals.

5 With regard to the second occasion, Mary Stadler and Nichole Coates came to the
6 office the next day accompanied by a female police officer. The police were seeking to move
7 Stadler and Coates out of the apartment to another location for their protection. Cyronek
8 testified that during the ten minutes that Coates also was in the office she was bored and
9 wanted to leave. This struck Cyronek "as a little funny for somebody who's supposedly
10 allegedly raped that, you know, wasn't upset or anything like that." Cyronek testified that in
11 her opinion, "I just, with my own self, that if somebody had been raped that they would seem
12 a little bit more nervous, more . . . [counsel supplies word] . . . [y]eah, traumatized, that's the
13 word I want to use, traumatized." Cyronek testified that Coates was not "shaking in terror" –
14 the day after the attack – and that she instead acted bored and like it was an imposition to be
15 there, asking two times if they could leave.⁶⁴

16 The resident apartment manager acknowledged on cross-examination that she never
17 personally had had any contact with a rape victim.⁶⁵

18 The second defense witness, Kathryn Uhrich, previously had been a roommate and
19 coworker with Coates. Uhrich in the main corroborated testimony by prosecution witnesses,
20 including Coates, that: (a) Coates did not like Brown; (b) she did not like him because he
21 made sexual advances toward her when her mother was not nearby; and (c) she therefore
22 did not like going to her mother's apartment when she was not around. Uhrich testified that
23 it was Brown only that made sexual advances and that they were not acted on by Coates.

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25 ⁶⁴#29, Ex. 58, at 25-27.

26 ⁶⁵*Id.*, at 30-32.

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28 Cyronek otherwise corroborated testimony by State witnesses that Coates was not on the lease for
the apartment and did not have a key to the apartment. *Id.*, at 22-23.

1 Uhrich's last contact with Coates was in the summer of 1999, approximately nine months
2 before the attack.⁶⁶

3 No other evidence was introduced at trial in an attempt to call the State's evidence into
4 question by corroborating Brown's assertion that he was having a consensual sexual
5 relationship with Coates on and prior to March 21, 2000.

6 ***Standard of Review***

7 The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a "highly
8 deferential" standard for evaluating state-court rulings that is "difficult to meet" and "which
9 demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*,
10 131 S.Ct. 1388, 1398 (2011). Under this highly deferential standard of review, a federal court
11 may not grant habeas relief merely because it might conclude that a decision was incorrect.
12 131 S.Ct. at 1411. Instead, under 28 U.S.C. § 2254(d), the court may grant relief only if the
13 decision: (1) was either contrary to or involved an unreasonable application of clearly
14 established law as determined by the United States Supreme Court based on the record
15 presented to the state courts; or (2) was based on an unreasonable determination of the facts
16 in light of the evidence presented at the state court proceeding. 131 S.Ct. at 1398-1401.

17 A state court decision on the merits is "contrary to" law clearly established by the
18 Supreme Court only if it applies a rule that contradicts the governing law set forth in Supreme
19 Court case law or if the decision confronts a set of facts that are materially indistinguishable
20 from a Supreme Court decision and nevertheless arrives at a different result. *E.g., Mitchell*
21 *v. Esparza*, 540 U.S. 12, 15-16 (2003). A decision is not contrary to established federal law
22 merely because it does not cite the Supreme Court's opinions. *Id.* Indeed, the Court has held
23 that a state court need not even be aware of its precedents, so long as neither the reasoning
24 nor the result of its decision contradicts them. *Id.* Moreover, "[a] federal court may not

26 ⁶⁶ #29, Ex. 58, at 33-34, 37-40 & 41-42.

27 Uhrich otherwise testified to the collateral matter of Coates' prior abusive relationship with her former
28 boyfriend.

1 overrule a state court for simply holding a view different from its own, when the precedent
 2 from [the Supreme] Court is, at best, ambiguous.” 540 U.S. at 16. For, at bottom, a decision
 3 that does not conflict with the reasoning or holdings of Supreme Court precedent is not
 4 contrary to clearly established federal law.

5 A state court decision constitutes an “unreasonable application” of clearly established
 6 federal law only if it is demonstrated that the state court’s application of Supreme Court
 7 precedent to the facts of the case was not only incorrect but “objectively unreasonable.” *E.g.*,
 8 *Mitchell*, 540 U.S. at 18; *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004).

9 To the extent that the state court’s factual findings are challenged, the “unreasonable
 10 determination of fact” clause of Section 2254(d)(2) controls on federal habeas review. *E.g.*,
 11 *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This clause requires that the federal
 12 courts “must be particularly deferential” to state court factual determinations. *Id.* The
 13 governing standard is not satisfied by a showing merely that the state court finding was
 14 “clearly erroneous.” 393 F.3d at 973. Rather, AEDPA requires substantially more deference
 15 to the state court’s determination:

16 [I]n concluding that a state-court finding is unsupported by
 17 substantial evidence in the state-court record, it is not enough that
 18 we would reverse in similar circumstances if this were an appeal
 19 from a district court decision. Rather, we must be convinced that
 an appellate panel, applying the normal standards of appellate
 review, could not reasonably conclude that the finding is
 supported by the record.

20 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); *see also Lambert*, 393 F.3d at 972.

21 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be correct
 22 unless rebutted by clear and convincing evidence.

23 The petitioner bears the burden of proving by a preponderance of the evidence that
 24 he is entitled to habeas relief. *Pinholster*, 131 S.Ct. at 1398.

25 **Discussion**

26 **Ground 3: Sufficiency of the Evidence**

27 The Court discusses Ground 3 before the remaining grounds because it provides
 28 context for the remaining claims.

1 In Ground 3, Petitioner alleges that there was insufficient evidence to sustain his
2 conviction for three counts of sexual assault because he allegedly instead had a consensual
3 sexual relationship with his stepdaughter.

4 On direct appeal, the Supreme Court of Nevada rejected the claim presented to that
5 court on the following grounds:

6 . . . Brown contends that insufficient evidence was
7 adduced at trial to support his conviction on three counts of
8 sexual assault. Brown argues that he had a consensual sexual
9 relationship with his stepdaughter, and that she "was never raped,
10 but was acting as a hurt and jilted partner" because he refused
11 [to] leave her mother. In support of his contention, Brown cites to
12 allegedly inconsistent statements made by the victim, and points
13 out that a witness testified at trial that after the attack, "she did
14 not notice any unusual behavior on the part of [the victim]." We
15 conclude that Brown's contention is without merit.

16 Evidence of sexual penetration is required to sustain a
17 conviction for sexual assault. Pursuant to NRS 200.366(1), the
18 State must prove that the sexual penetration occurred "against
19 the will of the victim or under conditions in which the perpetrator
20 knows or should know that the victim is mentally or physically
21 incapable of resisting." Sexual penetration is defined in NRS
22 200.364(2) as "cunnilingus, fellatio, or any intrusion, however
23 slight, of any part of a person's body . . . into the genital or anal
24 openings of the body of another, including sexual intercourse in
25 its ordinary meaning."

26 In this case, our review of the record on appeal reveals
27 sufficient evidence to establish guilt beyond a reasonable doubt
28 as determined by a rational trier of fact." In particular, we note
that the victim testified to the following facts at trial. After finishing
a late shift at work, she arrived at her mother's apartment around
12:30-1:00 a.m., hoping to sleep. She found her mother asleep
in the bedroom and Brown in another room listening to music and
watching television, so she slept beside her mother in the bed. At
a certain point during the night, the victim awoke to find Brown
sitting on the bed next to her. She immediately jumped up and left
the room, and went to sleep on the couch in the living room.

After her mother left work the following morning, the victim
was awakened when Brown hit her over the head with a cast iron
skillet. Brown told her that he had a pistol but would not kill her
if she did what he said. With a tight grip around her arm, Brown
proceeded to grope her breasts, outside and underneath her
shirt. The victim protested repeatedly and cried. Brown told her
that if she did not quiet down, he would kill her, and then took off
her pants. The victim testified that Brown forcibly carried her into
the bedroom. Despite her continuous crying and resistance,
Brown digitally and orally penetrated her vagina, and ultimately
engaged in sexual intercourse.

1 Based on the above, we conclude that the jury could
2 reasonably infer from the evidence presented that Brown
3 committed three counts of sexual assault. Although the medical
4 examination revealed no conclusive evidence of a sexual assault,
5 the nurse who examined the victim testified at trial that in
6 approximately "forty to forty-five percent of [sexual assault] cases,
7 there is no trauma." Photographs taken of the victim and witness
8 testimony confirmed the victim's injuries, yet the victim's
9 uncorroborated testimony alone would have been sufficient to
prove that a sexual assault had occurred. Additionally, evidence
of Brown's flight after the assault is relevant to demonstrate
consciousness of guilt. As this court has stated many times, it is
for the jury to determine the weight and credibility to give any
allegedly conflicting testimony, and the jury's verdict will not be
disturbed on appeal where, as here, substantial evidence
supports the verdict. Therefore, we conclude that Brown's
contention is without merit.

10 #30, Ex. 76, at 4-6 (citation footnotes omitted).

11 The state supreme court's rejection of this claim was neither contrary to nor an
12 unreasonable application of clearly established federal law as determined by the United
13 States Supreme Court.

14 On a challenge to the sufficiency of the evidence, the habeas petitioner faces a
15 "considerable hurdle." *Davis v. Woodford*, 333 F.3d 982, 992 (9th Cir. 2003). Under the
16 standard announced in *Jackson v. Virginia*, 443 U.S. 307 (1979), the jury's verdict must stand
17 if, after viewing the evidence in the light most favorable to the prosecution, any rational trier
18 of fact could have found the essential elements of the offense beyond a reasonable doubt.
19 *E.g.*, *Davis*, 333 F.3d at 992. Accordingly, the reviewing court, when faced with a record of
20 historical facts that supports conflicting inferences, must presume that the trier of fact
21 resolved any such conflicts in favor of the prosecution and defer to that resolution, even if the
22 resolution by the state court trier of fact of specific conflicts does not affirmatively appear in
23 the record. *Id.* The *Jackson* standard is applied with reference to the substantive elements
24 of the criminal offense as defined by state law. *E.g.*, *Davis*, 333 F.3d at 992. When the
25 deferential standards of the AEDPA and *Jackson* are applied together, the question for
26 decision on federal habeas review thus becomes one of whether the state supreme court's
27 decision unreasonably applied the *Jackson* standard to the evidence at trial. *See, e.g.*, *Juan*
28 *H. v. Allen*, 408 F.3d 1262, 1274-75 (9th Cir. 2005). Thus, when a federal court assesses a

1 sufficiency of the evidence challenge to a state conviction under AEDPA, “there is a double
2 dose of deference that can rarely be surmounted.” *Boyer v. Belleque*, 659 F.3d 957, 964 (9th
3 Cir. 2011).

4 Petitioner relies, first, on his own self-serving statements maintaining that he had been
5 having a consensual sexual relationship with Coates and that he had consensual sex with her
6 on March 21, 2000. A suggestion that self-serving statements by the defendant on trial
7 render the State’s evidence insufficient to sustain a conviction would be risible. The conflict
8 between Coates’ account and Brown’s account was a matter to be considered and resolved
9 by the jury. That is bedrock law on this issue. The jury accepted Coates’ account over
10 Brown’s account. That is the end of that matter.

11 Petitioner urges, second, that Coates’ injuries were not consistent with a frying pan
12 being broken over her head because she did not suffer any broken bones and did not have
13 a concussion. He contends that his injuries – allegedly a confirmed knot over his eyebrow –
14 instead were consistent with Coates hitting him with the frying pan. Petitioner posits that the
15 broken frying pan was consistent with his story that he threw the pan after hitting Coates
16 because “[t]he pan likely broke upon impact against a wall or the floor.”⁶⁷

17 Petitioner points to no evidence – as opposed to bald supposition – that the injuries
18 that Coates sustained were not consistent with a frying pan being broken over her head.
19 Moreover, Coates testified only that she woke up to being hit in the head with the frying pan
20 and thereafter saw Brown sitting on the coffee table with the piece of the frying pan with the
21 handle in his hand.⁶⁸ Her testimony did not establish what Brown hit before she woke up,
22 when he hit what he hit, how he hit what he hit, and/or how many times he hit what he hit
23 before she woke up. Nor did her testimony establish specifically when the frying pan broke
24 and on what it broke. She simply woke to being hit in the head with a frying pan that she
25 thereafter observed was broken. Petitioner thus relies on nothing more than supposition both

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27 ⁶⁷#80, at 25-26.

28 ⁶⁸See text and record cites, *supra*, at 3.

1 that: (a) the frying pan broke in two specifically when striking Coates in the head before she
2 woke up; and (b) if Brown hit her head in some manner that broke the frying pan, he could do
3 so only by also fracturing her skull and causing a concussion. Petitioner's bald supposition
4 constitutes neither medical nor metallurgical evidence -- much less evidence combining both
5 disciplines -- tending to establish what was and was not physically possible with regard to
6 what medical injuries might be associated with what damage to the particular frying pan used
7 under various possible scenarios.

8 The State of course had the burden of proof. However, the State discharged that
9 burden, amply, with testimony by Coates that she woke up to being beaten by Brown with a
10 frying pan, which she then observed had split in two, and that he then forcibly raped her while
11 threatening to kill her if she did not comply. To carry its burden of proof, the State was not
12 required to negate every *post hoc* unsubstantiated supposition by counsel as to what
13 allegedly necessarily would or would not happen to either the victim or the instrument used
14 when someone attacked a sleeping victim with a particular frying pan.⁶⁹

15 Petitioner contends, third, that alleged inconsistencies between Coates' trial testimony
16 and her prior statement to Detective Love rendered the evidence insufficient.

17 At the outset, a number of the alleged inconsistencies relied upon by Petitioner are at
18 best strained on their face.

19 Petitioner maintains that alleged statements to the detective that there was absolutely
20 no altercation between Coates and Brown and no motivating event for the sexual assault was
21 inconsistent with Coates trial testimony that Brown was partying loudly the night before and
22

23 ⁶⁹While the point is a collateral one, the actual evidence at trial does not support the assertion that
24 Brown had "a confirmed knot over his eyebrow" that was consistent with Brown's account that Coates hit him
25 with the frying pan. Detective Love testified only that Brown showed her "a bump" almost a month after the
26 incident, that she did not observe any bruising at that time, and that she did not know the source of the bump.
27 See text and record cites, *supra*, at 12. Merely because the prosecution does not affirmatively negate every
28 unsubstantiated and/or speculative assertion that defense and/or federal habeas counsel may postulate does
not signify that the State's case was based on speculation. Coates testified that Brown brutally attacked and
then raped her. Her testimony was more than sufficient to sustain the conviction, and was not grounded in
speculation as to what happened, from the point that she woke up while being beaten by Brown with a frying
pan and thereafter was forcibly raped.

1 sat next to Coates on the bed while she was sleeping. An *arguendo* statement that there was
 2 no “altercation” the night before and no motivating event is not at all necessarily inconsistent
 3 with testimony that Brown was loud the night before and startled Coates by sitting next to her
 4 on the bed while she slept. Assuming, *arguendo*, that the word “altercation” was the word
 5 actually used in Coates’ statement, Coates easily could have construed the word to mean
 6 “fight.” She did not have a fight *per se* with Brown the night before; she yelled at him when
 7 she woke up to him sitting by her. Moreover, nothing in that incident remotely provided a
 8 “motivating event” for Brown to brutally attack and then rape Coates.⁷⁰

9 Petitioner next maintains that Coates told the detective that “she was laying on her
 10 back with her arm over her face” but testified instead at trial that “she was lying on her side,
 11 with her hand over her face.” Petitioner urges that this distinction is important “because
 12 Brown would not have been able to hit Coates in the back of the head with the pan if she was
 13 lying on her back at the time.”⁷¹

14 Petitioner overstates the clarity of the trial testimony, by both witnesses, as to the
 15 actual positioning of Coates’ head. While Coates testified that her back -- more or less -- was
 16 facing outward from the couch, the trial transcript reflects that she demonstrated the position
 17 of her body and specifically of her head more than describing it clearly in words.⁷² Detective
 18 Love, in turn, testified – only from recollection – initially that Coates “said she was laying on
 19 her back and that her arm was over her face.” Per counsel’s request, she demonstrated that

21 ⁷⁰Indeed, Coates testified on cross that there was no “altercation” before she went to bed. #29, Ex.
 22 55, at 88; see also #29, Ex. 55, at 85 (defense counsel asks about “a physical altercation, by that I mean
 23 fight”). Because of the trial court ruling allowing the defense to cross-examine the detective on Coates’
 24 statement without having cross-examined Coates on the points, the trial record often contains only defense
 25 counsel’s characterization of the statements. The detective pointed out that she had not reviewed the victim’s
 26 statement in preparing for her testimony because she was not expecting to testify as to the statement. #29,
 Ex. 57, at 190. While counsel on occasion provided her a copy of the statement to refresh her recollection,
 counsel did not do so as to all of the questions asked. The State could have recalled Coates per the ruling,
 but such a move would have allowed the defense a windfall cross-examination opportunity that a prosecutor
 could have concluded was not worth allowing in order to address collateral points.

27 ⁷¹#80, at 26.

28 ⁷²#29, Ex. 55, at 37, lines 15-19; 99, lines 17-24; & 100.

1 “I believe she was like this.” Love then testified that “that’s how I demonstrated,” and that “I
2 couldn’t tell your from memory how she demonstrated it, though.” The detective testified that
3 Coates was “laying on her back a little bit propped up on a pillow,” and agreed with a leading
4 question that she “*otherwise* was on her back, flat on her back.”⁷³

5 The record does not affirmatively demonstrate that testimony by Coates, *inter alia*, that
6 “[n]o, it wasn’t on my back, it was on my side, but not exactly on my back” and “I was laying
7 exactly like this right here, this”⁷⁴ necessarily is inconsistent with testimony by Detective Love
8 that “I believe she was like this.” The trial transcript before this Court on federal habeas
9 review does not establish that Coates told Detective Love in the first instance that her *head*
10 was in a position where she could not have been struck in the back of the head by the frying
11 pan. The necessary predicate that her statement suggested that Coates was in a position
12 that ruled out being struck in the back of the head is not supported by the trial record. Nor
13 does the trial evidentiary record establish that the physical demonstration given by Coates at
14 trial differed either from what she actually said⁷⁵ to Love and/or from Love’s own
15 demonstration. Petitioner’s supposition that Coates’ statement to Detective Love necessarily
16 would rule out the prospect of her being hit in the back of the head thus simply is not
17 supported by the trial record.

18 Moreover, Coates testified that she did not know how many times that she may have
19 been hit, woke up, blacked out, and then woke up again while still being hit.⁷⁶ Under *Jackson*,
20 reasonable jurors readily could reach a natural and very permissible inference that a victim
21 being beaten with a frying pan while asleep might not be able to definitively and conclusively

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23 ⁷³#29, Ex. 57, at 188-89.

24 ⁷⁴*Id.*, Ex. 55, at 99-100.

25 ⁷⁵See note 70, *supra*. Detective Love was not presented with a transcript of Coates’ statement on
26 this point and then asked questions about the other witness’ statement. She was testifying “cold” based on
27 recollection and leading questioning. There perhaps is a reason why evidence rules instead require that the
28 witness who allegedly made the inconsistent statement be the one subject to cross-examination regarding the
statement.

⁷⁶#29, Ex. 55, at 97-98.

1 establish the exact positioning of her head at all points during such a process, whether while
2 asleep, temporarily knocked unconscious and/or dazed while being hit.

3 Petitioner further maintains that “Coates provided inconsistent testimony on the issue
4 of . . . whether Brown went through her purse looking for condoms (ex. 57, p. 198).”⁷⁷
5 Petitioner cites in the foregoing to testimony by Detective Love on cross-examination.
6 Petitioner does not cite to any trial testimony by *Coates* – one way or the other – regarding
7 Brown going through her purse looking for condoms. The Court could find no such trial
8 testimony by *Coates*. Obviously, an alleged inconsistency that does not even exist in the trial
9 record cannot provide a viable basis for challenging the sufficiency of the evidence even if the
10 Court were to indulge an *arguendo* assumption that such an alleged inconsistency could
11 render the evidence insufficient in the first instance.⁷⁸

12 Neither the foregoing nor the remaining alleged inconsistencies relied upon by
13 Petitioner – regarding, e.g., where clothes were removed and when *Coates* first saw Brown
14 holding the knife – rendered the extensive inculpatory testimony sustaining the conviction
15 insufficient to sustain the conviction. The testimony of both the sexual assault nurse and the
16 detective reflected that *Coates* was rational yet traumatized after the attack and rape. The
17 nurse testified that *Coates* was coherent but her account was disjointed at times as to what
18 happened specifically in what order, which was not uncommon for victims of an attack.⁷⁹ The
19 remaining alleged inconsistencies relied upon herein were explored in cross-examination of
20 the detective and weighed by the jury in the context of the remaining evidence. Under well-
21 established law, a court reviewing the sufficiency of the evidence under the *Jackson* standard
22 must presume that the jury resolved all such inconsistencies in favor of the prosecution.

23 Petitioner contends, fourth, that “*Coates* testified that she ‘resisted the whole time’
24 while Brown was sexually assaulted her, however there were no injuries supporting such

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26 ⁷⁷#80, at 26.

27 ⁷⁸See also text and record cites, *supra*, at 10 (detective’s testimony on redirect).

28 ⁷⁹See text, *supra*, at 9-10.

1 testimony.” Petitioner misstates the trial testimony. Coates testified that she resisted Brown
2 in the context of testimony that she resisted his efforts to molest her on the couch, to remove
3 her clothes, and to move her from the couch to the bedroom.⁸⁰ The bruises and abrasions
4 on her arms were consistent with her resistance, over and above the substantial injuries that
5 she sustained at the very outset of the attack.⁸¹ The absence of injury to which Petitioner
6 apparently refers is the absence of vaginal injury from Brown’s sexual penetration.⁸² By that
7 point, Brown had hit Coates on the head and face an indeterminate number of times,
8 repeatedly threatened to kill her if she did not comply with his demands, and forcibly held and
9 then moved her about by the arms. As the sexual assault nurse testified, a rape victim often
10 would not exhibit trauma from sexual penetration in circumstances where they simply were
11 trying to stay alive by the time of the actual sexual penetration.⁸³ Petitioner’s suggestion –
12 that Coates’ testimony that she resisted and did not consent to having sex with Brown was
13 inconsistent with medical testimony that she sustained no vaginal injury after having been
14 brutally attacked and threatened with death prior to being raped – has nil persuasive force,
15 whether under the *Jackson* standard or otherwise.

16 The proposition that there was insufficient evidence of forcible sexual assault in this
17 case is wholly without merit. There is no good faith argument on the facts of this case that
18 the trial evidence was insufficient to sustain Brown’s conviction on three counts of sexual
19 assault – whether on a *de novo* review or most assuredly on deferential AEDPA review.
20 Petitioner presents – at the exceeding level best – conflicts in the evidence coupled with bald
21 speculation as to the circumstances under which a particular frying pan necessarily would split
22 on impact. It is established beyond all peradventure that conflicts in the evidence and
23 competing inferences to be drawn from the evidence do not render the evidence insufficient
24

25 ⁸⁰See text and record cites, *supra*, at 3-4.

26 ⁸¹*Id.*, at 6-7.

27 ⁸²*Id.*, at 8.

28 ⁸³*Id.*

1 to convict under the *Jackson* standard. Nor must the State negate every unsupported *post*
 2 *hoc* speculative supposition advanced by a defendant. Merely reurging debating points from
 3 a defense closing argument does not set forth a viable claim of insufficiency of the evidence.
 4 There, again, simply is no good faith argument on the facts of this case that the evidence at
 5 trial was constitutionally insufficient to sustain a conviction for sexual assault.

6 Ground 3 therefore does not provide a basis for federal habeas relief, as the evidence
 7 indisputably was sufficient to sustain a conviction under *Jackson v. Virginia*.

8 ***Ground 1(B): Effective Assistance at Trial – Unfavorable Defense Witness***

9 In Ground 1(B),⁸⁴ Petitioner alleges that he was denied effective assistance of trial
 10 counsel in violation of the Sixth and Fourteenth Amendments when defense counsel called
 11 a witness, Kathryn Uhrich, who allegedly only bolstered the State's case.

12 The Court summarized Uhrich's testimony, *supra*, at 17-18.⁸⁵

13 The state district court concluded that trial counsel rendered deficient performance in
 14 calling Uhrich. The state courts held, however, that Petitioner did not demonstrate the
 15 requisite prejudice to sustain a claim of ineffective assistance of counsel.

16 The Supreme Court of Nevada held in particular as follows:

17 . . . Brown claims that trial counsel was ineffective for
 18 calling a defense witness who bolstered the State's case. Brown
 19 fails to demonstrate that he was prejudiced. At trial, the defense
 20 called Kathryn Uhrich as a witness in an attempt to show that
 21 Brown and the victim had a preexisting loving relationship.
 22 However, Uhrich testified that the victim did not like Brown. The
 23 district court found that Uhrich's testimony "did not help put
 24 forward [Brown's] theory that he and the victim had a loving
 relationship." However, despite concluding that counsel's
 performance was deficient, the district court found that Brown
 failed to demonstrate prejudice. We agree that in light of the
 evidence presented at trial, Brown fails to demonstrate that but
 for this brief testimony, there was a reasonable probability of a
 different result at trial. Therefore, the district court did not err in
 denying this claim.

25 #31, Ex. 117, at 4.

27 ⁸⁴The Court dismissed Grounds 1(A) and (H) as untimely.

28 ⁸⁵See also #31, Ex. 96, at 9-13 & 61-62 (counsel's testimony at the state court evidentiary hearing).

1 The state courts' rejection of this claim – for absence of the requisite prejudice – was
2 neither contrary to nor an unreasonable application of clearly established federal law.

3 On a claim of ineffective assistance of counsel, a petitioner must satisfy the
4 two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). He must demonstrate
5 that: (1) counsel's performance fell below an objective standard of reasonableness; and (2)
6 counsel's defective performance caused actual prejudice. On the performance prong, the
7 issue is not what counsel might have done differently but rather is whether counsel's
8 decisions were reasonable from her perspective at the time. The court starts from a strong
9 presumption that counsel's conduct fell within the wide range of reasonable conduct. On the
10 prejudice prong, the petitioner must demonstrate a reasonable probability that, but for
11 counsel's unprofessional errors, the result of the proceeding would have been different. *E.g.*,
12 *Beardslee v. Woodford*, 327 F.3d 799, 807-08 (9th Cir. 2003).

13 This Court cannot say that it might not have reached the same conclusion as the
14 Supreme Court of Nevada on a *de novo* review.

15 To be sure, the case turned to a not insignificant degree on an assessment of the
16 relative credibility of the accounts by Coates and Brown as to what actually occurred inside
17 the apartment on the morning in question. However, Coates immediately called 911 and
18 reported the rape after running from the apartment and then immediately called her mother.
19 She exhibited not only significant injuries to her head and face, including an eye that was
20 swelling shut as she was being examined, but also had contusions and bruises on her arms
21 that were consistent with her account of Brown holding and/or directing her forcibly by her arm
22 or arms at several points. Professionals – as opposed to a bystander called by the defense
23 who saw Coates only from one side briefly from a distance – who examined Coates
24 immediately after the attack observed a traumatized, crying and distraught young woman who
25 was coherent but nonetheless slightly “scattered” by the trauma when describing the events.⁸⁶

26 ////

27
28 ⁸⁶See text and record cites, *supra*, at 5-10.

1 Brown, in contrast, instead immediately fled after the attack, and his self-serving
2 account nearly a month later after being apprehended hardly resonates with credibility even
3 on a cold record. Brown's account included embellishments that did not fit the time line
4 and/or that otherwise strained credulity. These included allegedly taking Stadler and Coates
5 out to a special dinner the evening before, allegedly following Coates to the Subway after the
6 attack at a time when paramedics instead already were being dispatched to a nearby
7 apartment following her 911 call, and his assertion that two female employees lied about his
8 being in the Subway the following day because one of them was having a lesbian relationship
9 with Stadler. His account otherwise reads as an over-the-top fantasy where Coates allegedly
10 had been bringing multiple males to the apartment and having sex with them on the floor but
11 also was accusing him of rape because she wanted him to leave her mother for her because
12 no one else allegedly could satisfy her the way that he did. Brown made these assertions
13 after immediately fleeing from apprehension, ultimately leaving the state altogether, and
14 thereafter lying to officers in Michigan regarding his identity.⁸⁷

15 The Court thus cannot say that it would not have reached the same conclusion on a
16 *de novo* review that there was not a reasonable probability that, but for trial counsel's deficient
17 performance in calling Uhrich, the result of the trial would have been different. Even if this
18 Court would have reached a different conclusion, it may not grant habeas relief merely
19 because it may believe that the state court decision was incorrect. Rather, "[a] state court's

21 ⁸⁷ Respondents further point to defense counsel's reliance upon Uhrich's testimony in closing as being
22 inconsistent with an alleged statement by Coates to Detective Love that Brown had made no prior sexual
23 advances other than the incident where Brown kissed her on the mouth. Defense counsel relied upon this
24 alleged inconsistency as part of a general argument attacking Coates' credibility. See #29, Ex. 59, at 55-56.
25 While that may have been what counsel argued, the Court has not been able to locate any reference in
26 Detective Love's testimony that Coates made a prior statement in that regard. It therefore appears that
27 defense counsel was arguing based upon facts not actually in evidence. In any event, any such alleged
28 inconsistency hardly carries any substantial weight in weighing the probabilities at trial. What Uhrich
characterized as "sexual advances" in her testimony may well have corresponded to the uncomfortable looks
to which Coates in fact did testify. #29, Ex. 55, at 125. Lawyers perhaps attach far more significance than do
jurors, or judges, to such dubious cross-witness "impeachment" on collateral points that may turn on little
more than the inexact terminology used by different witnesses and/or different witnesses' differing recollection
as to hearsay from long before trial. This collateral use of Uhrich's testimony by trial counsel in her closing
argument does not have any significant bearing on this Court's analysis of prejudice under *Strickland* in this
case, one way or the other.

determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court's decision.” *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011). Petitioner has not demonstrated that the state supreme court’s rejection of his claim under the prejudice prong of *Strickland* was objectively unreasonable under this deferential standard of review.⁸⁸

Ground 1(B) therefore does not provide a basis for federal habeas relief.

Ground 1(C): Effective Assistance – Evidence of Prior Confrontation

In Ground 1(C), Brown alleges that he was denied effective assistance of trial counsel when defense counsel elicited testimony regarding a prior confrontation between Brown and the victim where Brown allegedly attempted to kiss the victim and they fought one another.

The Court summarized the trial testimony relevant to this claim, *supra*, at 14-15.

At the state post-conviction evidentiary hearing, defense counsel testified that she made a strategic decision to elicit the testimony because she wanted to use the testimony to suggest that Brown and Coates had a volatile – but romantically volatile – relationship prior to the alleged attack. That is, she sought to portray the incident as in fact a thinly-veiled lover’s quarrel that broke out while the two actually were in the presence of Stadler.⁸⁹

The Supreme Court of Nevada rejected the claim presented to that court on the following grounds:

. . . Brown claims that trial counsel was ineffective for opening the door to evidence of a prior confrontation between Brown and the victim. Brown fails to demonstrate that trial counsel's performance was deficient or that he was prejudiced.

⁸⁸Petitioner essentially rehashes the point that Uhrich’s testimony corroborated the State’s case and did not help the defense case. Deficient performance rarely will be helpful to the defense. *Strickland* requires that the deficient performance be harmful to the point of there being a reasonable probability of a different outcome but for the deficient performance. Petitioner has not demonstrated prejudice under that standard on the facts presented. *Strickland* clearly does not establish an essentially one-prong test where demonstration of deficient performance automatically establishes resulting prejudice to the requisite degree. To the extent, if any, that Uhrich’s testimony undermined the testimony of the other defense witness, Mary Cyronek, as argued by Petitioner, the allegedly undermined testimony itself was not of substantial significance. See text and record cites, *supra*, at 15-18. There is not a reasonable probability that the outcome of the case turned on the testimony elicited from either witness, whether singly or collectively.

⁸⁹#30, Ex. 94, at 16-20; #31, Ex. 96, at 3-8, 43-48 & 57-58.

During cross-examination of the victim, trial counsel elicited testimony that Brown had previously tried to kiss the victim, she had then struck him, he struck her back, and the police were called. No one was arrested. The record reflects, and the district court found, that trial counsel made a tactical decision to elicit this testimony in order to show a pattern of fighting followed by consensual contact. In the context of claims of ineffective assistance of counsel, "a tactical decision . . . is virtually unchallengeable absent extraordinary circumstances." Foster v. State, 121 Nev. 165, 170, 111 P.3d 1083, 1087 (2005) (quoting Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996)) (internal quotation marks omitted). Brown has not demonstrated extraordinary circumstances here. Moreover, defense counsel testified that she "still was not certain that the facts of that prior incident as revealed to the jury was actually damaging to the defendant." Brown fails to demonstrate that, but for trial counsel's elicitation of this incident, there is a reasonable probability that the result of trial would have been different. Therefore, the district court did not err in denying this claim.

#31, Ex. 117, at 3-4.

The state supreme court's rejection of this claim was neither contrary to nor an unreasonable application of *Strickland*.

While surmounting *Strickland*'s high bar is "never an easy task," federal habeas review is "doubly deferential" on the performance prong in a case governed by the AEDPA. In such cases, the reviewing court must take a "highly deferential" look at counsel's performance through the also "highly deferential" lens of § 2254(d). *Pinholster*, 131 S.Ct. at 1403 & 1410.

As the Supreme Court explained in *Pinholster*:

In *Strickland*, . . . [t]he Court acknowledged that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.*, at 689, 104 S.Ct. 2052.

Recognizing the "tempt[ation] for a defendant to second-guess counsel's assistance after conviction or adverse sentence," *ibid.*, the Court established that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *id.*, at 690, 104 S.Ct. 2052. To overcome that presumption, a defendant must show that counsel failed to act "reasonabl[y] considering all the circumstances." *Id.*, at 688, 104 S.Ct. 2052. The Court cautioned that "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Id.*, at 690, 104 S.Ct. 2052.

.....

The [reviewing court must not overlook] “the constitutionally protected independence of counsel and ... the wide latitude counsel must have in making tactical decisions.” 466 U.S., at 689, 104 S.Ct. 2052. Beyond the general requirement of reasonableness, “specific guidelines are not appropriate.” *Id.*, at 688, 104 S.Ct. 2052. “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions” *Id.*, at 688–689, 104 S.Ct. 2052. *Strickland* itself rejected the notion that the same investigation will be required in every case. *Id.*, at 691, 104 S.Ct. 2052 (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary” (emphasis added)). It is “[r]are that constitutionally competent representation will require ‘any one technique or approach.’” [*Harrington v. Richter*, 562 U.S. —, —, 131 S.Ct. 770, 779, 178 L.Ed.2d 624 (2011)]

. . . . *Strickland* specifically commands that a court “must indulge [the] strong presumption” that counsel “made all significant decisions in the exercise of reasonable professional judgment.” 466 U.S., at 689–690, 104 S.Ct. 2052. The [reviewing court is] required not simply to “give [the] attorneys the benefit of the doubt,” . . . but to affirmatively entertain the range of possible “reasons . . . counsel may have had for proceeding as they did”

Pinholster, 131 S.Ct. at 1403 & 1407.

Petitioner contends that counsel made the tactical decision without making an adequate investigation of the prior incident because she allegedly did not review the police report from the prior incident. He alleges that counsel so testified at the state post-conviction evidentiary hearing. Petitioner maintains that a tactical decision made without adequate investigation is not entitled to deference under *Strickland*. He contends that the state courts’ rejection of the claim thus both was based upon an unreasonable determination of fact and was an objectively unreasonable of *Strickland*.

Petitioner’s argument is not supported by the entire testimony presented. Trial counsel had only an incomplete independent recollection of the trial by the time of the evidentiary hearing. The hearing transcripts are replete with instances where counsel stated that she did not recall or remember the point in question or only “believed” or “thought” that some fact was correct. She had not independently reviewed the trial transcript or other materials from the

1 criminal case beforehand to refresh her recollection. On a number of points, what she
 2 purportedly did “recall” at the evidentiary hearing was based upon what *state post-conviction*
 3 *counsel* had told her about the case either in a recent meeting about the case and/or while
 4 she then was on the stand. In short, trial counsel’s testimony was to an extent “coached”
 5 based upon what a lawyer representing one side of the post-conviction case had told her had
 6 happened.⁹⁰

7 This point is critical – on a number of claims discussed herein, including this one –
 8 because what state post-conviction counsel told trial counsel well after the fact was belied by
 9 the record on a number of points. Trial counsel thus on occasion was speaking based upon
 10 assumptions as to what she did or did not do and/or the consequences thereof that were not
 11 supported by the actual historical record as opposed to what state post-conviction counsel
 12 had told her had happened.

13 On direct at the evidentiary hearing, trial counsel proceeded on assumptions, supplied
 14 by state post-conviction counsel, that: (a) she had elicited testimony as to the prior incident
 15 without having read the police report and being familiar with the particulars; and (b) the State
 16 thereafter was able to introduce additional significantly prejudicial particulars regarding the
 17 incident of which she allegedly had been unaware due to an incomplete investigation.⁹¹ On
 18 cross-examination, however, it was established that trial counsel in fact had defended Brown
 19

20 ⁹⁰See, from direct and redirect, #30, Ex. 94, at 10, lines 14-19; 12, line 25; 13, lines 7 & 16; 16, line
 21 15 (referring to what counsel had told her); 17, lines 8 & 20-21 (referring to what counsel had told her); 18,
 22 lines 9-11 & 15-18; 19, lines 7 & 10; 20, line 20; #31, Ex. 96, at 3, lines 5-7; 4, line 5; 5, lines 2-7; 6, lines 6,
 23 14 & 22-23; 7, lines 7 & 20-23; 8, lines 2-25 (“I remember it slightly, ‘cause you brought it up to me . . . you
 24 talked to me about it prior to the – this hearing”); 9, lines 3-25 (“If you say so, yes.”); 10, lines 3-22 (then
 25 recollection thereafter refreshed by document); 12, lines 8-23; 13, line 8-24; 15, lines 11-23 (“That makes
 26 sense, but I don’t remember.”); 18, lines 23-25; 19, at lines 10-11 (. . . perhaps. Is that what you’re saying?”);
 27 20, at lines 7, 10-12, 18-25; 21, lines 1-4 & 14-19 (“If you say so . . .”)(recollection refreshed by document);
 28 23, lines 18-20; 24, lines 4-9 & 24; 25, lines 2-9; 26, lines 7-24; 27, lines 1-27 (recollection, partially, refreshed
 29 by document); 28, lines 5-24; 29, lines 2-25; 30, lines 1-23; 31, lines 11-25; 32, lines 1-4 & 32-33; 33, line 1;
 34 35, lines 23-25; 37, at 2-7 (“I don’t remember. You’ve pointed that out to me . . .”)(recollection refreshed by
 35 document); 38, at 7-13 (“Well, actually it’s not [after reviewing the actual document] – it’s not as bad as what I
 36 thought you said originally when you were telling me about it.”); 54, lines 1-9 (recollection refreshed by
 37 document); 55, lines 4-10; 56, lines 7-19; 57, line 21; and 62, lines 5-12.

38 ⁹¹#30, Ex. 94, at 16-20; #31, Ex. 96, at 3-8.

1 on the charges arising from the prior incident in a May 2000 trial prior to the August 2001 trial
2 in the present case. She therefore was familiar with the particular circumstances of the prior
3 incident at the time of the August 2001 trial. Counsel's *entire* testimony on the point ultimately
4 led to this conclusion: "I got into [it] knowingly. I got into [it] knowingly what this was about,
5 yes. I got into it because I thought it would not be inconsistent with our defense."⁹²

6 Moreover, the additional particulars that were developed by the State regarding the
7 incident were not necessarily damningly prejudicial in the context of the defense theory being
8 pursued. On cross at trial, defense counsel elicited testimony that Brown tried to kiss Coates,
9 she slapped him, he hit her, and she and her mother left to call the police at a 7-11.⁹³ On
10 redirect, the prosecution elicited details that the confrontation allegedly arose out of an
11 argument between Brown and Coates' mother in which he "mumbled something to her . . .
12 concerning the knife" and Coates confronted him about what he meant to do. According to
13 Coates, her mother then went into the bathroom as Stadler and Brown continued arguing
14 while ignoring Coates, Brown tried to kiss Coates, she slapped him, and he punched her in
15 the mouth and they fell fighting to the floor with him punching her in the stomach.⁹⁴

16 At the state court evidentiary hearing, post-conviction counsel generally referred
17 vaguely in his questioning to unspecified prejudicial evidence coming in. When defense
18 counsel asked state post-conviction counsel what the evidence was, he referred to "the issue
19 where Mr. Brown was alleged to have attacked Mary, Nichole's mother; that he had physically
20 assaulted her."⁹⁵ However, there was no such evidence introduced at trial regarding the prior
21 incident. There was evidence of Brown mumbling something about a knife in an argument,
22 but no evidence of Brown beating or otherwise physically abusing his wife. And while there
23 was additional information regarding the fight between Brown and Coates, the very point of
24

25 ⁹²#31, Ex. 96, at 43-45, 46-47 & 57-58.

26 ⁹³#29, Ex. 55, at 88-90.

27 ⁹⁴*Id.*, at 119-25.

28 ⁹⁵#31, Ex. 96, at 7.

1 the strategy pursued by defense counsel was to try to portray the two as having a history of
2 “both loving and fighting” as described by defense counsel at the hearing.⁹⁶

3 On federal habeas review, Petitioner urges that the evidence showed that Brown was
4 a bad person and the sole aggressor, supporting the State’s case and undermining the
5 defense theory of a mutually tumultuous relationship. Petitioner ignores the fact that defense
6 counsel elicited the testimony precisely to suggest a tumultuous relationship where Coates
7 and Brown both “fought and loved.” The defense theory was to use the incident to argue that
8 Coates and Brown “fought and loved” in the prior incident just as they did on the day of the
9 alleged attack, where according to Brown’s account, they had consensual sex and then had
10 a – similarly – very violent fight where each hit the other with the frying pan. The additional
11 detail elicited on redirect regarding how violent the prior fight had been added to rather than
12 detracted from that defense theory.

13 As the Supreme Court has observed, “[t]here are countless ways to provide effective
14 assistance in any given case,” and “[e]ven the best criminal defense attorneys would not
15 defend a particular client in the same way.” *Strickland*, 466 U.S. at 689. Petitioner in the final
16 analysis is engaging in a *post hoc* second-guessing of defense counsel’s strategy at trial
17 based on the evidence available to her. While federal habeas counsel now seeks to draw
18 other inferences from the evidence, defense counsel at the time instead was seeking to draw
19 other inferences consistent with Brown’s theory of defense. She elicited the testimony in an
20 effort to indirectly corroborate Brown’s account in which he and Coates allegedly had
21 consensual sex but also then fought one another viciously on the day of the alleged attack.
22 Strategic choices by trial counsel made after investigation are “virtually unchallengeable.”
23 *Strickland*, 466 U.S. at 690. The state supreme court’s conclusion in this case, *inter alia*, that

24
25
26 ⁹⁶E.g., #31, Ex. 94, at 3. The Court notes that defense counsel’s initial testimony on direct -- after
27 also having had state post-conviction counsel “refresh” her recollection in a prior meeting -- was premised
28 upon misrepresentation of the record by post-conviction counsel. A reviewing court never is bound on post-
conviction review by purported “admissions” of a defense attorney at an evidentiary hearing, especially so
when the underlying premises are belied by the record. In this case, defense counsel was not always given
accurate information when she sought to have her recollection refreshed by state post-conviction counsel.

1 trial counsel's strategic decision -- which the full record reflects was made on adequate
 2 investigation -- did not constitute deficient performance was based upon neither an
 3 unreasonable determination of fact nor an objectively unreasonable application of *Strickland*.

4 Ground 1(C) therefore does not provide a basis for federal habeas relief.⁹⁷

5 ***Ground 1(D): Effective Assistance – Custodial Status and Threats to Officer***

6 In Ground 1(D), Brown alleges that he was denied effective assistance of trial counsel
 7 when defense counsel failed to seek to exclude evidence of his fugitive and custodial status
 8 at trial and of his threats to a correctional officer while maintaining his innocence.

9 With regard to custodial status, Petitioner refers to: (a) testimony by a Michigan law
 10 enforcement officer as to his apprehension of Brown as part of a multi-agency fugitive task
 11 force pursuant to a fugitive warrant; (b) testimony by the investigating detective that she
 12 interviewed Brown at the detention center following his arrest in Michigan and extradition to
 13 Nevada and further that he would not have been free to leave but would have to return to his
 14 cell after the interview; and (c) testimony by a correctional officer regarding statements made
 15 by Brown while in custody.⁹⁸

16 With regard to threats, Petitioner refers to threats made to the correctional officer in
 17 the course of vehemently maintaining his innocence, including threats to harm his family.⁹⁹

18 The Supreme Court of Nevada rejected the claims presented to that court on the
 19 following grounds:

20 . . . Brown claims that trial counsel was ineffective for
 21 failing to preclude evidence of his fugitive status, his violent
 22 behavior while in custody, and his threats against a correctional
 23 officer. Brown fails to demonstrate that he was prejudiced. With
 regard to the evidence of Brown's fugitive status, this court, has
 already concluded that it was admissible because it was relevant

24
 25 ⁹⁷ *Strickland* is a two-pronged standard. If the state supreme court's holding on deficient performance
 withstands review under AEDPA, this Court need not address the prejudice prong.

26
 27 ⁹⁸ See text, *supra*, at 11 & 13 n.55; #29, Ex. 57, at 144-49 (Michigan officer); *id.*, at 150-56 (detention
 center officer); *id.*, at 161-64 & 167-68 (investigating detective). The Michigan officer was not an FBI agent.

28 ⁹⁹ #29, Ex. 57, at 150-56.

1 to demonstrate his consciousness of guilt. Brown v. State,
 2 Docket No. 39514 (Order of Affirmance, August 13, 2003).
 Accordingly, Brown fails to demonstrate that trial counsel was
 3 deficient for failing to object to this evidence.

4 With respect to the testimony of Corrections Officer Steven
 Young about Brown's violent conduct and threats after being
 5 apprehended, the district court concluded that this evidence
 should have been objected to and should not have come in.
 6 Nevertheless, the district court found that Brown had "not shown
 that but for said errors, there was a reasonable probability that he
 7 would have been acquitted at trial." The trial record reflects that
 Officer Young's testimony was brief and the prosecutor never
 asked Officer Young to elaborate on his statements. And Officer
 8 Young confirmed that Brown had maintained his story that the
 sexual encounter with the victim was consensual. Officer Young's
 9 testimony in this regard supported the defense theory at trial. In
 light of the evidence presented at trial, including the victim's
 10 testimony, her 911 call, documentation of her physical injuries,
 and Brown's subsequent flight to Michigan, Brown fails to
 11 demonstrate that objection to the testimony had a reasonable
 probability of resulting in his acquittal. Therefore, the district court
 12 did not err in denying this claim.

13 #31, Ex. 117, at 2-3.

14 Petitioner has not demonstrated that the state supreme court's rejection of the claim
 15 pertaining to the references to his fugitive and custodial status – as not constituting deficient
 16 performance – was contrary to or an unreasonable application of clearly established federal
 17 law as determined by the United States Supreme Court.

18 Petitioner points to the fact that the state supreme court referred explicitly only to the
 19 aspect of the claim regarding his fugitive status.¹⁰⁰ The state high court implicitly rejected,
 20 however, his exhausted claim as well regarding the references to his custodial status.
 21 Petitioner does not point to any decisions of the United States Supreme Court that would
 22 require that the state supreme court conclude that defense counsel failed to raise a
 23 meritorious objection. The United States Supreme Court holdings to date address only
 24

25 ¹⁰⁰The Court would note in this regard that it was necessary to establish that the officers in Michigan
 26 were seeking to execute a fugitive warrant on Brown in order to lay the predicate for the admission of his
 attempt to avoid apprehension by lying about his identity. Merely establishing that he lied about who he was
 27 to a number of individuals who happened to be at his sister's house that day would not have laid the required
 predicate. To that extent, the references to fugitive status and warrants was part and parcel of the flight
 28 evidence. Fleeing or seeking to avoid apprehension by officers seeking to take the defendant into custody
 clearly is admissible evidence rather than any impermissible reference to fugitive and/or custodial status.

1 presence at trial in prison garb. Petitioner relies upon a number of federal appellate opinions
2 in regard to references to custodial status, but a federal court of appeals is not the United
3 States Supreme Court. Citation to decisions from other state courts fail to satisfy Petitioner's
4 burden under AEDPA for the same reason. The state supreme court's implicit conclusion that
5 an objection on the facts presented in this particular case would not have been a meritorious
6 objection that should have been raised by counsel under its own state law precedents is a
7 matter as to which that court is the final arbiter.

8 Petitioner further has not demonstrated that the state supreme court's rejection of the
9 claim pertaining to the threats to the correctional officer – under the prejudice prong of
10 *Strickland* – was contrary to or an unreasonable application of clearly established federal law.

11 Against the backdrop of the trial evidence, the state supreme court's conclusion that
12 there was not a reasonable probability that an objection to the testimony would have resulted
13 in a different outcome at trial was not an objectively unreasonable application of *Strickland*.¹⁰¹
14 Petitioner urges that he has established the requisite prejudice because the evidence
15 allegedly constituted improper propensity evidence. Merely rehashing the point that the
16 evidence allegedly should not have been admitted in the first instance does not establish that
17 the *Strickland* prejudice standard has been satisfied. Moreover, as Petitioner acknowledges,
18 the United States Supreme Court has not held as yet that the introduction of propensity
19 evidence violates due process. See, e.g., *Alberni v. McDaniel*, 458 F.3d 860, 863-67 (9th Cir.
20 2006). Again, however, merely establishing that evidence allegedly was inadmissible,
21 whether on federal constitutional or state law grounds, but was not objected to does not
22 automatically establish prejudice under *Strickland*. The *Strickland* standard, again, is a two-
23 pronged standard. Showing deficient performance, as was found to be present by the state
24 courts, does not in and of itself establish the requisite prejudice.

25 Ground 1(D) therefore does not provide a basis for federal habeas relief.
26

27
28 ¹⁰¹See text, *supra*, at 1-18 (extensive summary of trial evidence); *id.*, at 29-31 (discussing the trial
evidence in addressing prejudice issue on a claim of ineffective assistance of counsel herein).

Ground 1(E): Effective Assistance – Cross-Examination of Victim

In Ground 1(E), Petitioner alleges, in the main, that he was denied effective assistance of trial counsel when counsel elected to not impeach the victim's testimony with prior inconsistent statements during cross-examination and instead developed the inconsistent statements through the testimony of the investigating detective.

The Court summarized the trial testimony relevant to this claim, including the victim's testimony, *supra*, at 2-6 & 9-10.

At the state post-conviction evidentiary hearing, defense counsel testified that she made a strategic decision to develop the victim's prior inconsistencies through the testimony of the investigating detective rather than on cross-examination of the victim. As defense counsel explained in response to state post-conviction counsel's questions:

A Okay. Basically there was no question that Ms. Coates was battered in this case, and I felt like if I could avoid beating her up on the stand and still bring out her lies through another witness, that would be more beneficial to Johnny not to make the jury angry at me for beating up on a person who obviously had been abused, while not sexually abused, but at least abused, and she was a young girl as well, so, and he was an older gentleman.

.....

A I didn't want to be perceived as beating her up, because I don't – I thought the jury would come to the conclusion that there was a fight between Johnny and Nichole, and certainly he was probably the stronger party.

....

.....

Q With regard to Johnny being the stronger party, was there not any time when you felt that you had a defense against the physical contact between them with regard to Nichole being an initial aggressor [based on Brown's statement that Coates attacked him first], or did you discount that?

A I didn't consider it strongly, because I didn't think the jury would buy that that she was the physical aggressor, number one; and that she – and that he was entitled to self-defense.

.....

1 A No. I just didn't want to be perceived as beating her
 2 up about it. I didn't think that they would buy a self-
 3 defense for Johnny, but – so I did not think it was
 4 worthwhile. I mean, we were trying to beat the rape
 5 charge to be quite honest with you [as opposed to a
 6 battery charge that would be a misdemeanor if not
 7 committed in the course of a sexual assault], and so I did
 8 not think it was worth upsetting the jury for me to beat up
 9 this girl who obviously got into a fight with Johnny and
 10 perhaps got the raw end of it, and I'm – so, I just – that's
 11 – I hope that answers your question

12 A Yeah. I didn't think it mattered who I challenged her
 13 credibility with [regarding prior inconsistent statements],
 14 and if I make the jury upset attacking this young girl, it
 15 could go against Johnny, so that's why I didn't do it.

16

17 Q Now in hindsight do you still think that you made the
 18 right strategy decision with regard to that [after the State
 19 criticized the defense in closing argument for not
 20 challenging Coates directly regarding the inconsistencies]?

21 A I don't know. I don't know how that weighed. I
 22 don't know. I occasionally do that though, try not to attack
 23 the – if I feel that there's a victim in the case that's going
 24 to be sympathetic, sometimes I try to. I try to avoid an
 25 attack upon that victim, so I don't know. If it hurt Johnny,
 26 I'm sorry that it happened that way, but I don't know.

27 #30, Ex. 94, at 13-16. See also #31, Ex. 96, at 16-18 & 34-45 (regarding battery charge); *id.*,
 28 at 39-40 & 59-60 (regarding Coates being half the size of Brown, other bases for questioning
 her character on the evidence, and the use of the inconsistent statements in the defense
 closing).

The Supreme Court of Nevada rejected the claim presented to that court on the
 following grounds:

. . . Brown claims that trial counsel was ineffective for
 failing to adequately cross-examine the victim. Specifically, Brown
 claims that trial counsel was ineffective for failing to impeach the
 victim with inconsistencies in her prior statements. Brown fails to
 demonstrate that counsel's performance was deficient or that he
 was prejudiced. Brown's trial counsel testified that she
 "intentionally brought out the victim's inconsistent statements
 through her examination of Detective Love, rather than by
 impeaching the victim" as a trial strategy intended to "avoid
 arousing the jury's sympathies for the victim." As stated above, in
 the context of claims of ineffective assistance of counsel, "a

tactical decision . . . is virtually unchallengeable absent extraordinary circumstances." *Id.* Brown has not demonstrated extraordinary circumstances here. Moreover, the record reflects that trial counsel "made a very long list for the jury regarding every inconsistent statement the victim made during the investigation of the case" and highlighted them in closing argument. Thus, Brown fails to demonstrate a reasonable probability that, had trial counsel conducted a more forceful cross-examination of the victim, the results of trial would have been different. Therefore, the district court did not err in denying this claim.

#31, Ex. 117, at 4-5.

The state supreme court's rejection of this claim was neither contrary to nor an unreasonable application of *Strickland*.

Petitioner contends that "[t]rial counsel admitted at the evidentiary hearing that her strategy might have been unreasonable."¹⁰² That assertion does not fairly characterize defense counsel's testimony at the evidentiary hearing. A reviewing court does not second guess trial counsel's decisions after the fact with the benefit of hindsight. *Post hoc* second guessing based on hindsight – even *arguendo* by trial counsel herself – does not satisfy a petitioner's burden of proof under *Strickland*. Moreover, reviewing courts are not bound by any such *arguendo* "admission" by defense counsel. It is abundantly clear that trial counsel made a calculated strategic decision to not evoke further sympathy by the jury for the victim by appearing figuratively to further "beat up" on the victim on the stand.

Strategic choices by counsel made after investigation are "virtually unchallengeable." *Strickland*, 466 U.S. at 690. Petitioner's argument that counsel's "purported strategy was unreasonable" fails to establish that the state supreme court's rejection of this claim was an objectively unreasonable application of the performance prong of the *Strickland* standard.

Ground 1(E) therefore does not provide a basis for federal habeas relief.¹⁰³

¹⁰²#80, at 14.

¹⁰³As noted previously, *Strickland* is a two-pronged standard. If the state supreme court's holding on deficient performance withstands review under AEDPA, this Court need not address the prejudice prong. Petitioner further asserts that Coates testified that she resisted but there allegedly were no supporting injuries. Petitioner does not explain how this assertion relates to this claim. See also text, *supra*, at 26-27.

Ground 1(F): Effective Assistance – Brown’s Statement

In Ground 1(F), Petitioner alleges that he was denied effective assistance of trial counsel when counsel failed to move to suppress his statement to the police on the grounds that he was not competent to voluntarily, knowingly, and intelligently waive his *Miranda* rights.

The content of the statement as presented at trial is summarized in the text, *supra*, at 11-13.

Brown had prior mental health issues but ultimately was found competent to stand trial after a period of time in a mental health facility.

During the trial, the state trial court conducted an on-the-record colloquy with Brown outside the presence of the jury regarding his election as to whether to testify. During that colloquy, it was noted that Brown had a prior felony conviction for kidnaping as to which the sentence had been fully discharged less than ten years prior to the trial. The conviction therefore properly could be a subject of inquiry on cross-examination if he testified. Brown indicated that he would not be testifying because the jury already had his statement and nothing had changed in his account.¹⁰⁴

At the state post-conviction evidentiary hearing, defense counsel testified as follows regarding her decision to not challenge the admission of the statement:

Q Okay. Given the rambling nature and the lengthy nature of the statement and your knowledge of some mental health issues of Mr. Brown –

A Uh-huh, yes.

Q – did you ever consider attempting to suppress some or all of the statement based on those type of issues?

A Not really, because if – there’s other things I regret, but if we were going to trial and consent was our defense, his statement was certainly consistent with that. The district attorney agreed to redact what I felt were most of the really inflammatory and prejudicial portions of it, but I did not think that Johnny would have – well I didn’t want to

¹⁰⁴#29, Ex. 58, at 17-20.

1 put him on the stand because of his priors and also wasn't
2 sure he'd make a good witness, so I made a trial strategy
3 decision to let it go into evidence.

4

5 Q So did you feel though that you were stuck with
6 Johnny's statement that if it was out it would have been
7 better or worse for the defense?

8 A I think – in the grand scheme of this case the
9 statement is better to have come in, 'cause we couldn't
10 have had the consent issue brought before the jury without
11 the opportunity for the State to bring in his priors and also
12 have him on cross-examination.

13

14 Q So is your testimony . . . with regard to the
15 statement itself, you may have had grounds to do a motion
16 to suppress, but you felt it was a strategic decision to bring
17 that statement in?

18 A Yes, that's right.

19 Q Is that correct?

20 A I'm not positive I would have had grounds to
21 suppress it, but I may have because he definitely had
22 mental health issues and it was definitely sort of a
23 rambling statement. I mean it's, you know, but part of it
24 was coherent, but there were parts that were sort of
25 rambling. I'm not positive whether or not we would have
26 had anyone to say it was an involun – you know, it was --

27 Q But certainly not raised to the court?

28 A Exactly. I – we decided not to raise it, and we may
have had it; we may not have. I didn't check it out.

#31, Ex. 96, at 34-36. See also *id.*, at 47-48 & 52-53.¹⁰⁵

¹⁰⁵Counsel further explained that she did not argue self-defense against the battery charge premised upon Brown's account that Coates had been the aggressor. The charge was a felony only if committed with the intent to commit a sexual assault. If the jury believed Brown's account and acquitted him of the sexual assault but nonetheless found him guilty of battery based on his account, his maximum exposure on what then would become a misdemeanor charge of battery would be only six months. He had been detained longer than that prior to trial. As counsel explained, the defense to the felony battery charge was not self-defense but instead was that "there was consent and therefore no intent to commit sexual assault." She did not believe that a jury would accept self-defense. #31, Ex. 96, at 16-18 & 34-36.

1 The state district court concluded, *inter alia*, that “[m]ental illness is not the equivalent
2 of mental incompetence and Defendant has failed to overcome the presumption that he was
3 sane at the time that he gave his statement.”¹⁰⁶

4 The state supreme court rejected the claim on the post-conviction appeal on the basis
5 that Petitioner had failed to provide any argument in support of the claim demonstrating error
6 in the decision below.¹⁰⁷

7 Petitioner contends that the Court must look to the state district court decision as the
8 last reasoned decision of the state courts, pursuant to *Ylst v. Nunnemaker*, 501 U.S. 797
9 (1991). He maintains that the state district court found that trial counsel was ineffective under
10 the totality of the circumstances and that a conclusion that Petitioner did not demonstrate
11 prejudice was an unreasonable application of *Strickland*.

12 Although the Court cited *Ylst v. Nunnemaker* in its prior holding on the exhaustion issue,
13 it is not entirely sanguine that the rule of *Harrington v. Richter*, *supra*, does not instead apply
14 in this context. In *Harrington*, the Supreme Court held that a state court decision
15 unaccompanied by a specifically articulated explanation – such as the state supreme court’s
16 decision on this claim – is subject to the same standard of deferential review as an articulated
17 decision. See 131 S.Ct. at 784.

18 It is not clear that the state district court made a specific holding as to this particular
19 claim that trial counsel had rendered deficient performance. The discussion of “ineffective
20 assistance” under a “totality of the circumstances” analysis is ambiguous.

21 It would be difficult to conclude on the record presented that trial counsel rendered
22 deficient performance in not seeking to suppress the redacted statement. Trial counsel quite
23 clearly made a strategic decision to use rather than seek to suppress the statement.
24 Petitioner urges that the strategic decision was not based upon an adequate investigation
25 because counsel did not first investigate whether the statement might be suppressed for lack
26

27 ¹⁰⁶#31, Ex. 99, at 10.

28 ¹⁰⁷See discussion of the procedural history and state supreme court decision in #74, at 3-6.

1 of competency. However, “counsel has a duty to make reasonable investigations or to make
2 a reasonable decision *that makes particular investigations unnecessary.*” *Strickland*, 466 U.S.
3 at 691 (emphasis added). Once counsel made a strategic decision to rely upon the statement
4 even if it perhaps might be subject to potential objection, there was no further need to spend
5 limited preparation time to determine whether a viable objection might be presented.
6 Counsel’s strategic decision was based upon the quite common sense point that she would
7 have no other affirmative evidence to present that the sex instead was consensual – short of
8 putting a defendant on the stand with a prior conviction and who in her judgment might be a
9 worse witness on cross-examination (perhaps even on direct) than the statement itself. A
10 holding that Petitioner had not demonstrated prejudice was not an objectively unreasonable
11 application of *Strickland*.

12 First, as the state district court order suggested, establishing that Brown had a history
13 of mental health issues did not necessarily establish that a motion to suppress would have
14 been successful based on the premise that Brown was not competent at the time to waive his
15 *Miranda* rights. Findings at one point that Brown was not competent to stand trial did not
16 establish that he was not competent at any and all other points in time. Moreover, a suspect
17 is not necessarily incompetent merely because he gives a rambling statement.

18 Second, further to the point, Petitioner cannot establish that there was a reasonable
19 probability that the suppression of the statement would have resulted in a different outcome
20 at trial. Absent the statement, the only account at trial of what happened inside the apartment
21 would have been provided by the victim. After having reviewed the evidence herein on
22 Petitioner’s challenge to the sufficiency of the evidence, including the medical testimony
23 discussing the absence of vaginal trauma, the Court can hardly imagine a quicker route to a
24 conviction on the facts of this case other than by the defense securing the suppression of
25 Brown’s statement. Petitioner’s underlying premise apparently is that there was a reasonable
26 probability of a different result at trial had defense counsel instead relied only on
27 inconsistencies in the, clearly battered, victim’s statements and the absence specifically of
28 vaginal trauma. That premise is, at the exceeding best, highly questionable given the

1 evidence at trial.¹⁰⁸ To be sure, Brown could have taken the stand rather than the defense
2 relying instead on the statement. The jury then would have learned of Brown's felony
3 conviction and would have been presented with a witness who may well have been a poorer
4 witness than the statement standing alone.

5 Petitioner therefore cannot establish a reasonable probability that the suppression of
6 the statement – if it *arguendo* could have been suppressed in the first instance – would have
7 led to a different outcome at trial, which is the pertinent issue under *Strickland*.

8 The state courts' rejection of this claim accordingly was neither contrary to nor an
9 unreasonable application of *Strickland*.

10 Ground 1(F) therefore does not provide a basis for federal habeas relief.

11 ***Ground 1(G): Effective Assistance – Cross-Examination of Victim***

12 In Ground 1(G), Petitioner alleges that he was denied effective assistance of trial
13 counsel when counsel failed to ask any followup questions of the victim and the sexual
14 assault examination nurse regarding an alleged inconsistency between the victim's testimony
15 that she resisted and the nurse's testimony that the absence of evidence of vaginal trauma
16 was consistent with a witness who did not resist during the sexual assault itself.

17 The related trial testimony of the victim and the nurse is summarized in the text, *supra*,
18 at 2-5 and 7-9.

19 Neither the state district court decision nor the state supreme court decision provided
20 an articulated rationale for rejecting this specific claim. Petitioner concedes that *Harrington*
21 *v. Richter*, *supra*, states the appropriate standard of review on this claim.

22 In *Harrington v. Richter*, the Supreme Court rejected the proposition that a summary
23 rejection of a claim is entitled to less deference on AEDPA review. The Court held that
24 “[w]here a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s
25 burden still must be met by showing there was no reasonable basis for the state court to deny
26 relief.” 131 S.Ct. at 784. The Court made it clear that satisfying this burden is every bit as

27
28 ¹⁰⁸See also the discussion of Ground 1(G), *infra*.

1 difficult in a case with a summary denial as it is in a case with a fully-articulated decision:

2
3 If this standard is difficult to meet, that is because it was
4 meant to be. As amended by AEDPA, § 2254(d) stops short of
5 imposing a complete bar on federal court relitigation of claims
6 already rejected in state proceedings. *Cf. Felker v. Turpin*, 518
7 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996)
8 (discussing AEDPA's "modified res judicata rule" under § 2244).
9 It preserves authority to issue the writ in cases where there is no
10 possibility fairminded jurists could disagree that the state court's
11 decision conflicts with this Court's precedents. It goes no farther.
12 Section 2254(d) reflects the view that habeas corpus is a "guard
against extreme malfunctions in the state criminal justice
systems," not a substitute for ordinary error correction through
appeal. *Jackson v. Virginia*, 443 U.S. 307, 332, n. 5, 99 S.Ct.
2781, 61 L.Ed.2d 560 (1979) (Stevens, J., concurring in
judgment). As a condition for obtaining habeas corpus from a
federal court, a state prisoner must show that the state court's
ruling on the claim being presented in federal court was so
lacking in justification that there was an error well understood and
comprehended in existing law beyond any possibility for
fairminded disagreement.

13 131 S.Ct. at 786-87.

14 Under this standard of review, the state supreme court's rejection of this claim was
15 neither contrary to nor an unreasonable application of clearly established federal law.

16 For the convenience of reviewing courts, the Court simply sets forth again what it has
17 stated herein with regard to the alleged "inconsistency" between the testimony of the victim
18 and that by the nurse:

19
20 Petitioner contends, fourth, that "Coates testified that she
21 'resisted the whole time' while Brown was sexually assaulted her,
22 however there were no injuries supporting such testimony."
23 Petitioner misstates the trial testimony. Coates testified that she
24 resisted Brown in the context of testimony that she resisted his
25 efforts to molest her on the couch, to remove her clothes, and to
26 move her from the couch to the bedroom. The bruises and
27 abrasions on her arms were consistent with her resistance, over
28 and above the substantial injuries that she sustained at the very
outset of the attack. The absence of injury to which Petitioner
apparently refers is the absence of vaginal injury from Brown's
sexual penetration. By that point, Brown had hit Coates on the
head and face an indeterminate number of times, repeatedly
threatened to kill her if she did not comply with his demands, and
forcibly held and then moved her about by the arms. As the
sexual assault nurse testified, a rape victim often would not
exhibit trauma from sexual penetration in circumstances where
they simply were trying to stay alive by the time of the actual

sexual penetration. Petitioner's suggestion – that Coates' testimony that she resisted and did not consent to having sex with Brown was inconsistent with medical testimony that she sustained no vaginal injury after having been brutally attacked and threatened with death prior to being raped – has nil persuasive force, whether under the *Jackson* standard or otherwise.

Text, *supra*, at 26-27 (record citation footnotes therein omitted).

The argument that the victim's testimony was inconsistent with the nurse's testimony has no persuasive force. Trial counsel did not render deficient performance by not pursuing additional questions regarding an alleged inconsistency that was illusory rather than real.¹⁰⁹ There was not a reasonable probability that pursuing questions of either witness on such an illusory inconsistency would have altered the outcome at trial.

The state courts' rejection of this plainly insubstantial claim without further articulation was neither contrary to nor an objectively unreasonable application of *Strickland*.

Ground 1(G) therefore does not provide a basis for federal habeas relief.

Ground 1(I): Effective Assistance at Trial – Victim Drug Use

In Ground 1(I),¹¹⁰ Petitioner alleges that he was denied effective assistance of trial counsel when defense counsel failed to adequately develop evidence of the victim's drug use. Petitioner alleges that counsel failed to call the appropriate foundation witness to introduce a toxicology report, failed to request that the sample be retested to determine whether the victim used drugs closer to the time of the assault, and failed to present expert testimony allegedly establishing the impact of the victim's drug use on her perception of the events

¹⁰⁹ Nothing in trial counsel's testimony at the state court evidentiary hearing contradicts the conclusion in the text. As noted previously herein, trial counsel did not have complete recall regarding the case; she had been "coached" prior to the hearing by state post-conviction counsel; and state post-conviction counsel did not provide completely accurate information to trial counsel as to all areas of inquiry. See text, *supra*, at 33-34. In this instance, trial counsel had cross-examined the particular nurse in question in multiple trials and did not recall her cross in the particular case. State post-conviction counsel sought repeatedly to get counsel to concede that she overlooked or side-stepped an issue, but she repeatedly stated that she did not recall having done so. See #31, Ex. 96, at 25-27. State post-conviction counsel did not refresh her recollection at the hearing with any transcript pages reflecting deficient action on her part in this regard. Neither state post-conviction nor federal habeas counsel have identified what additional questions should have been asked of either witness that would have effectively further developed a purported inconsistency that simply was not there in the first instance. This claim simply has no basis in underlying fact.

¹¹⁰ The Court dismissed Grounds 1(A) and (H) as untimely.

1 during the incident.

2 At trial, Nichole Coates acknowledged having smoked marijuana when she was over
3 at her friend's apartment the evening prior to the attack. She further acknowledged having
4 used methamphetamine and cocaine previously in the past. On cross-examination, she
5 testified that "it had been awhile . . . I'd say two to three months" prior to the incident since she
6 had used cocaine. She testified that she had used methamphetamine "[t]wo days, three days
7 before."¹¹¹

8 During cross-examination of the sexual assault nurse, defense counsel sought to elicit
9 testimony as to the results of the toxicology lab test results obtained in connection with the
10 examination of Coates after the incident. The State's hearsay objection was sustained.¹¹²
11 The defense thereafter did not introduce evidence of the contents of the toxicology report
12 through other means.

13 The only evidence at trial regarding Coates' drug usage was her testimony that she
14 had smoked marijuana the evening prior to the morning attack, had used methamphetamine
15 two to three days prior to that, and had used cocaine two to three months before the incident.
16 According to the time line reflected by the testimony at trial, Coates had left her friend's
17 apartment approximately nine hours before the attack the next morning.¹¹³

18 At the state post-conviction evidentiary hearing, defense counsel lacked complete
19 independent recall with regard to the evidence of drug use at trial. Throughout the
20 questioning, state post-conviction counsel referred to there having been evidence that Coates
21 had used methamphetamine – not marijuana – prior to the attack, as if that were a fact
22 established by the trial evidence.¹¹⁴ No such fact of Coates allegedly being intoxicated on
23

24 ¹¹¹#29, Ex. 55, at 67-68 & 87-88.

25 ¹¹²*Id.*, Ex. 57, at 26-27.

26 ¹¹³See text and record cites, *supra*, at 2-6.

27 ¹¹⁴See #31, Ex. 96, at 3, lines 1-7; 13-16 (*inter alia*, referring to the possibility of Coates being on
28

(continued...)

1 methamphetamine at that time of course was established in the actual trial evidence.

2 Defense counsel acknowledged having not being able to introduce the toxicology
3 report through the nurse over the State's hearsay objection when showed the relevant portion
4 of the trial transcript. Her recollection was that she did not seek to introduce the report
5 through another witness because Coates had admitted drug usage. She further did not
6 believe that the levels of a drug or drugs would be reflected in the toxicology report.¹¹⁵

7 Defense counsel testified on questioning by the State that she did not believe that an
8 attack on Coates' ability to coherently perceive the events based upon a toxicology report and
9 expert testimony would have presented a viable argument based on the evidence at trial. She
10 testified that the recording of Coates' coherent call to 911, which was played to the jury, would
11 have undercut any such avenue of defense.¹¹⁶

12 Petitioner did not present any expert testimony at the state court evidentiary hearing
13 tending to establish that an actual rather than a hypothetical expert in fact would have
14 provided probative testimony that Coates' ability to perceive events at the relevant time was
15 impaired due to drug intoxication at that time.

16 Petitioner did not present any evidence at the hearing tending to establish that, if the
17 laboratory sample had been further tested, it would have established any further relevant and
18 probative evidence regarding the level of drugs in Coates' system at the time of the attack,
19 as a necessary factual predicate for such expert testimony.

20 Nor has Petitioner – on federal habeas review – established even that the excluded
21 toxicology report itself was part of the record on state post-conviction review, which also would
22 appear to have been a necessary factual predicate for any expert testimony. This Court was
23 unable to locate a record citation in Petitioner's federal filings reflecting that the toxicology

24
25 ¹¹⁴(...continued)
26 methamphetamine at the time of the 911 call); & 19-20 (referring to "the fact that methamphetamine use was
there").

27 ¹¹⁵*Id.*, at 53-55.

28 ¹¹⁶*Id.*, at 41-42.

1 report was part of the state post-conviction record. However, the Court was able to locate in
2 the record from the federal evidentiary hearing on timeliness what appears to be the excluded
3 toxicology report.¹¹⁷

4 The “chemistry” section of the report has three columns – one listing various drugs or
5 drug categories, a second reflecting “negative” or “positive,” and a third to the far right under
6 the heading “REFER. RANGE UNITS.” The report appears to reflect¹¹⁸ “positive” for cocaine,
7 amphetamine, and the active ingredient in marijuana, tetrahydrocannabinol (THC) in the
8 second column. However, that column shows no quantitative values for how much of each
9 drug was in Coates’ system at the time, down perhaps to trace metabolites from prior
10 ingestion. The third column shows “negative” for all columns, *i.e.*, there is no quantitative
11 value shown for any drug, including the drugs with a “positive” result in the second column.

12 The toxicology report – even if *arguendo* in the state post-conviction record – therefore
13 would not establish how much of any of the drugs then was in Coates’ system, how long prior
14 to the test that she may have done a particular drug or drugs, or how the drug or drugs would
15 have impacted her ability to perceive events at the relevant time. A subject of course can
16 “fail” a laboratory drug test by having residual amounts in her system even though she has
17 not done a particular drug for an interval prior to the test and is not currently intoxicated on
18 a drug or drugs. The toxicology report – standing alone without expert testimony – did not
19 establish the parameters required to generate a positive result for that particular report or
20 what having metabolites at that level would mean with regard to either recency of use or effect
21 on perception.

22 The state district court’s findings largely tracked defense counsel’s post-conviction
23 testimony as to what she did not do and why with regard to drug use evidence. The court
24 further concluded that “speculation about what an expert could have said is insufficient to
25

26 ¹¹⁷See Hearing Exhibit 11, at Bates 0007.

27 ¹¹⁸The Court is reading through what appears to be highlighting on the material, which produces a
28 black image on a photocopied document.

1 establish prejudice” and that Brown had “not shown and cannot show that level of prejudice
2 such that it was reasonably probable the outcome of his trial would have been different.”¹¹⁹

3 The state supreme court rejected the claim on the post-conviction appeal on the basis
4 that Petitioner had failed to provide any argument in support of the claim demonstrating error
5 in the decision below.¹²⁰

6 As the Court discussed also with regard to Ground 1(F), it is not sanguine that it must
7 look through to the state district court decision under *Ylst v. Nunnemaker, supra*, in this
8 situation rather than apply the rule of *Harrington v. Richter, supra*.

9 Under either approach, the state courts’ rejection of this claim was neither contrary to
10 nor an objectively unreasonable application of the prejudice prong of the *Strickland* analysis.
11 Even if the toxicology report excluded at trial *arguendo* was part of the state post-conviction
12 record, Petitioner presented nothing more than supposition that further pursuit of the issue
13 would have developed probative evidence that the victim was intoxicated to a sufficient
14 degree at a relevant time that would have affected her perception to a relevant degree at that
15 time. The cursory toxicology report itself did not constitute such evidence. Petitioner presents
16 nothing more than speculation that an expert could have based a probative opinion based
17 upon either the toxicology report or whatever other evidence might have been developed
18 along with the report. Speculation does not establish prejudice.

19 The state courts’ rejection of this claim therefore was neither contrary to nor an
20 unreasonable application of clearly established federal law.

21 Ground 1(I) therefore does not provide a basis for federal habeas relief.

22 **Ground 2: Joinder of Charges**

23 In Ground 2, Petitioner alleges that he was denied rights to due process of law and a
24 fair trial in violation of the Fifth and Fourteenth Amendments when the sexual assault and
25 battery charges against him were joined with charges of burglary and grand larceny arising
26

27 ¹¹⁹#31, Ex. 99, at 6 & 10.

28 ¹²⁰See discussion of the procedural history and state supreme court decision in #74, at 3-6.

1 out of his stealing money from the Subway at which he, Stadler, and Coates worked prior to
2 leaving town after the sexual assault.

3 On direct appeal, the Supreme Court of Nevada summarized the evidence on the
4 burglary and grand larceny charges and stated its reasons for rejecting the claim of improper
5 joinder as follows:

6 . . . Brown contends that the district court abused its
7 discretion in denying his pretrial motion to sever the burglary and
8 grand larceny counts from the battery and sexual assault counts
9 because the counts were unrelated. Brown argues that the
10 joinder of the charges was unduly prejudicial, and as a result, he
11 was deprived of his right to a fair trial. We disagree with Brown's
12 contention.

13

14 In this case, soon after sexually assaulting his wife's
15 19-year old daughter, Brown called the district manager of the
16 Subway where he worked with the victim's mother and told the
17 manager that he would no longer be working there. Brown asked
18 for his last paycheck, but was told he needed to wait until payday.
19 Brown proceeded to go to the Subway where he was scheduled
20 to work that day. Evidence presented at trial indicated that while
21 Brown's co-workers were busy with the afternoon lunch rush,
22 Brown stole the change bag and money from the safe, an amount
23 totaling approximately \$600.00. Brown subsequently fled to
24 Michigan where he was arrested on a fugitive warrant more than
25 two weeks later.[FN8]

26 We conclude that the district court did not abuse its
27 discretion in denying Brown's motion to sever the burglary and
28 grand larceny counts from the battery and sexual assault counts.
The evidence adduced at trial demonstrates that the offenses
"were at the very least 'connected together.'" Moreover, evidence
of the offenses would be cross-admissible in separate trials to
prove motive and intent. The State's theory was that the burglary
and grand larceny were clearly linked to the sexual assault and
were committed in order to aid Brown's flight from Las Vegas and
that Brown fled to Michigan in order to avoid future felony charges
stemming from the sexual assault. Brown failed to demonstrate
that joinder of the charges substantially influenced the jury or
rendered his trial fundamentally unfair, or that the joinder was
manifestly prejudicial. Therefore, we conclude that Brown's
contention is without merit.

[FN8] Brown claims that he was in Michigan for his
sister's wedding. When the Grand Rapids Police
Department detective approached Brown upon
seeing him in his sister's house, both Brown and his
sister tried to deceive the detective and identified

1 him as Jeffrey Brown, his brother.

2 #30, Ex. 76, at 1-4 (statement of legal standards and citation footnotes omitted).

3 The state supreme court's rejection of Petitioner's federal constitutional claim was
4 neither contrary to nor an objectively unreasonable application of clearly established federal
5 law as determined by the United States Supreme Court.

6 Petitioner relies upon *United States v. Lane*, 474 U.S. 438 (1986), which stated in a
7 footnote:

8 Improper joinder does not, in itself, violate the Constitution.
9 Rather, misjoinder would rise to the level of a constitutional
10 violation only if it results in prejudice so great as to deny a
defendant his Fifth Amendment right to a fair trial.

11 474 U.S. at 446 n.8.

12 The Ninth Circuit has held that this statement in *Lane* is *dicta* and that it thus does not
13 set forth clearly established law binding on the States on federal habeas review. See
14 *Runnigeagle v. Ryan*, 686 F.3d 758, 776-77 (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2766
15 (2013); *Collins v. Runnels*, 603 F.3d 1127, 1132-33 (9th Cir. 2010).

16 The Ninth Circuit's holding eliminates any further need for discussion on this claim.
17 Under controlling Ninth Circuit authority, the August 13, 2003, decision of the Supreme Court
18 of Nevada was neither contrary to nor an unreasonable application of clearly established
19 federal law as determined by the United States Supreme Court at the time of its decision.

20 Ground 2 therefore does not provide a basis for federal habeas relief.¹²¹

21
22 ¹²¹The Court further notes the following in passing. *First*, *Lane* addressed joinder of multiple
23 defendants under Federal Rule of Criminal Procedure 8(b), not joinder of charges against a single defendant.
24 Any constitutional joinder holding in that case would not have stated a standard for joinder of charges against
25 a single defendant, which would be the issue here. *Second*, the more general a constitutional rule, the more
26 leeway the states have in applying the rule in case-by-case determinations when later reviewed under
27 AEDPA. *Harrington v. Richter*, 131 S.Ct. at 786. *Third*, Petitioner's reliance on lower federal court decisions,
28 including in particular cases applying federal criminal procedure rules or decided well before AEDPA, is
wholly unavailing. This Court is not engaging in a *de novo* review of the Supreme Court of Nevada decision
for conformity with, for example, joinder cases arising out of the Ninth Circuit. That court's holdings instead in
Runnigeagle and *Collins* instead state the dispositive rule on this claim on deferential review under AEDPA.
Fourth, similarly, Petitioner is airing his disagreement with the state supreme court's application of the joinder

(continued...)

1 ***Consideration of Possible Issuance of a Certificate of Appealability***

2 Under Rule 11 of the Rules Governing Section 2254 Cases, the Court must issue or
3 deny a certificate of appealability (COA) when it enters a final order adverse to Petitioner.

4 As to the claims rejected by on the merits, under 28 U.S.C. § 2253(c), a petitioner must
5 make a "substantial showing of the denial of a constitutional right" in order to obtain a
6 certificate of appealability. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Hiivala v. Wood*,
7 195 F.3d 1098, 1104 (9th Cir. 1999). To satisfy this standard, the petitioner "must
8 demonstrate that reasonable jurists would find the district court's assessment of the
9 constitutional claim debatable or wrong." *Slack*, 529 U.S. at 484.

10 As to claims rejected on procedural grounds, the petitioner must show: (1) that jurists
11 of reason would find it debatable whether the petition stated a valid claim of a denial of a
12 constitutional right; and (2) that jurists of reason would find it debatable whether the district
13 court was correct in its procedural ruling. *Slack*, 529 U.S. at 484. While both showings must
14 be made to obtain a COA, "a court may find that it can dispose of the application in a fair and
15 prompt manner if it proceeds first to resolve the issue whose answer is more apparent from
16 the record and arguments." 529 U.S. at 485. Where a plain procedural bar is properly
17 invoked, an appeal is not warranted. 529 U.S. at 484.

18 The Court will grant a certificate of appealability as to its rejection on the merits of
19 Grounds 1(B), 1(C), 1(D) and 1(E). The Court remains of the view that its ruling on these
20 grounds was correctly decided. However, the points are sufficiently debatable to warrant

21 _____
22 ¹²¹(...continued)

23 rule in N.R.S. 173.115 in the wrong court. That court's application of its own state's law, including its holding
24 that evidence of the offenses would have been cross-admissible in separate trials under its prior *Petrocelli*
25 decision, is the final word on that subject. Neither Nevada state law regarding severance in state criminal
26 trials nor the rules regarding severance in federal trials is controlling on the federal constitutional question.
27 *E.g.*, *Grisby v. Blodgett*, 130 F.3d 365, 370 (9th Cir. 1997). *Fifth*, Petitioner's strained suggestion that the
28 State was relieved of its burden of establishing that Petitioner stole the money from the Subway begs the
question of whether the joinder of the charges was unconstitutional. There in any event was sufficient
circumstantial evidence reflected in the testimony of Subway employees Patricia Thorne and Tammy Cox for
a jury to conclude that Brown stole the money. See #29, Ex. 57, at 114-125 & 128-42.

In all events, however, there simply is no potentially viable claim here, given the binding Ninth Circuit
authority in *Runningeagle* and *Collins*.

1 appeal.

2 The Court will deny a COA as to the remaining claims considered on the merits as well
3 as with respect to the dismissal of two grounds as untimely.

4 Taking the remaining grounds out of order to provide context, Ground 3 alleges that
5 the evidence was insufficient to sustain a conviction on the three counts of sexual assault.
6 There in truth simply is no good faith argument available on the facts presented that the
7 evidence was insufficient to convict for sexual assault. The Court has extensively
8 summarized the trial evidence herein. **See text, *supra*, at 1-18.** Petitioner would resolve all
9 inconsistencies in the evidence and inferences that might be drawn from the evidence
10 presented at trial in favor of the defense. Controlling law instead clearly requires that a
11 reviewing court resolve all such inconsistencies and competing inferences in favor of the
12 prosecution, particularly under what is a doubly deferential review of the state supreme court
13 decision on the issue under AEDPA. There, again, simply is no good faith argument in this
14 case that the evidence was constitutionally insufficient to sustain the conviction, particularly
15 on deferential review. **See text, *supra*, at 19-28.**

16 In Ground 1(F), Petitioner alleges that he was denied effective assistance of trial
17 counsel when counsel failed to move to suppress his statement to the police on the grounds
18 that he was not competent to waive his *Miranda* rights. Regardless of whether or not the
19 reviewing court looks through to the state district court decision as the last reasoned decision,
20 jurists of reason would not find the rejection of the claim to be debatable or wrong. Trial
21 counsel clearly made a strategic decision to rely on a redacted version of the statement,
22 rather than on live testimony by the previously convicted defendant, to present his side of the
23 story. Having made that strategic decision, counsel was not required to further investigate
24 whether it would have been possible to suppress the statement. In all events, however, a
25 holding that Petitioner did not demonstrate prejudice was not an objectively unreasonable
26 application of *Strickland*. Petitioner did not demonstrate a reasonable probability of a different
27 outcome, based upon the prospect of either a motion to suppress actually succeeding or of
28 there being a different outcome at trial without the statement. There was no other affirmative

1 evidence available to present Brown's side of the story, and if he took the stand himself to
2 give his account – subject to cross-examination and impeachment by the prior conviction –
3 there is not a reasonable probability of a different outcome at trial. **See text, *supra*, at 43-47.**

4 In Ground 1(G), Petitioner alleges that he was denied effective assistance when trial
5 counsel failed to ask any followup questions of the victim and the sexual assault examination
6 nurse regarding an alleged inconsistency between the victim's testimony that she resisted and
7 the nurse's testimony that the absence of evidence of vaginal trauma was consistent with a
8 witness who did not resist during the sexual assault itself. The argument that the victim's
9 testimony was inconsistent with the nurse's testimony has nil persuasive force. By the time
10 of vaginal penetration, the victim had been hit in the head with a frying pan, forcibly held and
11 then forcibly moved to the bedroom, and threatened repeatedly with death if she did not
12 comply with Petitioner's demands. Petitioner seeks to equate the victim's actual testimony
13 that she resisted at earlier points with testimony that she did not give of continuing to resist
14 during actual vaginal penetration, after she was attacked and threatened with death. Trial
15 counsel did not render deficient performance by not pursuing additional questions regarding
16 an alleged inconsistency that was illusory rather than real. **See text, *supra*, at 47-49.**

17 In Ground 1(I), Petitioner alleges that he was denied effective assistance of trial
18 counsel when defense counsel failed to adequately develop evidence of the victim's drug use.
19 Petitioner alleges that counsel failed to call the appropriate foundation witness to introduce
20 a toxicology report, failed to request that the sample be retested to determine whether the
21 victim used drugs closer to the time of the assault, and failed to present expert testimony
22 allegedly establishing the impact of the victim's drug use on her perception of the events
23 during the incident. It does not appear that the toxicology report, if it had been admitted at
24 trial, would have established the amounts of drugs in the victim's system. She had admitted
25 to smoking marijuana approximately nine hours before the attack and using
26 methamphetamine two to three days prior. On state post-conviction review, Petitioner
27 presented nothing more than bald supposition that further development of the evidence would
28 have established that the amounts of drug metabolite left in the victim's system at the time

1 would support an expert opinion that she was intoxicated to the point of impairing her
2 perception during the attack. The fact that metabolites in undefined amounts remained in her
3 system at the time of the sexual assault examination – standing alone – did not establish that
4 further factual development would have resulted in the presentation of significantly probative
5 expert testimony. Petitioner therefore did not demonstrate that there was a reasonable
6 probability of a different outcome at trial but for the alleged deficiency by counsel. The same
7 conclusion follows regardless of whether or not the reviewing court looks through to the state
8 district court decision as the last reasoned decision. **See text, *supra*, at 49-53.**

9 In Ground 2, Petitioner alleges that he was denied rights to due process of law and a
10 fair trial when the sexual assault and battery charges against him were joined with charges
11 of burglary and grand larceny arising out of his stealing money from the Subway at which he,
12 the victim and her mother worked prior to his leaving town after the sexual assault. Under
13 controlling Ninth Circuit precedent, Petitioner cannot demonstrate that the state courts'
14 rejection of this claim was either contrary to or an unreasonable application of clearly
15 established federal law because there are no United States Supreme Court holdings, as
16 opposed to *dicta*, on the point. **See text, *supra*, at 53-55.**

17 With regard to the untimely Grounds 1(A) and 1(H), Petitioner does not present a
18 viable argument establishing a basis for either relation back or purported post-filing equitable
19 tolling at to these grounds. **See #74, at 8-14.**

20 IT THEREFORE IS ORDERED that all remaining claims in the Petition are DENIED
21 on the merits and that this action shall be DISMISSED with prejudice.

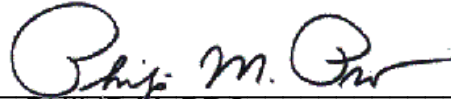
22 IT FURTHER IS ORDERED that a certificate of appealability is GRANTED IN PART
23 and DENIED IN PART, such that a certificate of appealability is GRANTED as to Grounds
24 1(B), 1(C), 1(D) and 1(E) and a certificate of appealability is DENIED as to the dismissal of
25 Grounds 1(F), 1(G), 1(I), 2 and 3 on the merits and the dismissal of Grounds 1(A) and 1(H)
26 as untimely. **See text, *supra*, at 56-59.**

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1 The Clerk of the Court shall enter final judgment accordingly in favor of Respondents
2 and against Petitioner, dismissing this action with prejudice.¹²²

3 DATED: September 24, 2013
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7 PHILIP M. PRO
8 United States District Judge
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27 ¹²²Petitioner's request for an evidentiary hearing is denied, as review under AEDPA is restricted to the
28 record presented to the state court that adjudicated the merits of the claims. See *Pinolster*, 131 S.Ct. at 1398-1401.